The SECOND PART

OF

CASES

ARGUED and DECREED

IN THE

HIGH COURT

OF

CHANCERY,

CONTINUED

From the Thirtieth Year of King *CHARLES* II.
To the Fourth Year of King *JAMES* II.

The **Second Edition** corrected, with many Additional **References.**

In the SAVOY:

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In the CAVSES:

The Second Edition corrected, with many Additions.

From the Fourth Year of the Reign of KING CHARLES II.

CONTINUED

CHANCERY

TO

HIGH COURT

OF

CASES

TO

THE SECOND PART

The Epistle Dedicatory.

TO THE

RIGHT HONOURABLE

Sir *NATHAN WRIGHT*, Knt.

Lord Keeper of the Great Seal of *England*, and one of the Lords of His Majesty's most Honourable Privy Council.

My LORD,

THE following Sheets humbly present themselves to Your Lordship's View, no ways presuming on their own Worth or Merit, but wholly confiding in Your Lordship's Goodness to accept them.

The Author (if I am rightly informed) was, when living, for many Years a Practiser of the first Rank, in that High and Honourable Court of which Your Lordship is now the Head, and greatest Ornament.

The Subject Matter being Equity, it carries something of Pretence (with Your Lordship's Pardon and Permission) to be addressed to Your Lordship, as the Fountain of Equity.

You

The Epiſtle Dedicatory.

You have, **My Lord,** *not only the Cuſtody of His Majeſty's Royal Seal, but You are the Great and Juſt Diſpenſer of the Royal Equity and Conſcience; and, I hope, of Mercy too, in forgiving the Confidence of this Addreſs.*

My Part herein has been little more than Midwifing into the World another's Orphan-Iſſue: And I was glad of finding this Occaſion publickly to profeſs my ſelf,

My Lord,

I

Your Lordſhip's Moſt Humble

and Moſt Obedient Servant,

J. W.

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DE
Term. Sanct. Hill.
Anno Regis 30 & 31 Car. II.
IN
CANCELLARIA.

Trustee robbed. Vide post 121, 135, &c.

Oath of the Party admitted as Proof on Account.

Bland *and* Middleton.

A Heir relieved against a conditional Devise for his Life.

Devise.
Condition.
1 Chan. C. 7, 89, 177.
Post 4, 50, 197.
Q. 1 Vern. 431.

BY Will in Writing J. S. seised in Fee, deviseth Land to his Daughter E. and her Heirs; and his Mind is, if his Son A. pay to her 50 l. then his Son should have that Land; the Money was not paid at the Day appointed by the Will; the Daughter sells the Land; it was decreed by the Lord Chancellor against the Vendee, on paying the Money, for he took it but as in the Nature of a Security; tho' it was objected by Sir Fr. Winnington, that this is a contingent Devise to the Son on Payment, and then too, if he had performed and paid, he could have had but an Estate for Life, the Remainder or Reversion in Fee to the Daughter.

Note; 'Tis no Reason, that his Failer should give the Son a greater Estate in Equity, than the Will in Writing gives him on Performance of the Condition, by the express Words of the Will in Writing, and the Will cannot be of Land, but in Writing: So as if the Testator having made such Will in Writing had by Parol declared that the Son should have the Fee-simple on Payment, it should not avail; yet it was decreed, ut supra. Quære si bene. For it is apparently contrary to the Words of the Will, and the Intent of the Testator. And the Heir is only to be preferred in doubtful Cases. 1 Chan. C. 7. 3 Chan. C. 131.

Morley *verſus* Morley. 15 February, 1678.

Truſtee robbed. Vide poſt 121, 132, &c.

THE Defendant was Truſtee for the Plaintiff an Infant, and received for him 40 l. in Gold; a Servant of the Defendant living in the Houſe with him robbed his Maſter of 200 l. and the 40 l. out of his Houſe. The Robbery, viz. That the Defendant was robbed of Money, was proved; the Sum of 40 l. was proved by only the Defendant's Oath.

Oath of the Party admitted as Proof on Account.

Lord Chancellor. He was to keep it but as his own, and allowed it on Account; ſo in Caſe of a Factor; ſo in Caſe of a Perſon robbed, for he cannot poſſibly have other Proof.

Anonymus. 25 Febr. 1678.

Damage for Legatee, from the Time of Demand, though no Relief by the Bill.

A Suit was begun for a Legacy, and to diſcover Aſſets, no Aſſets ſufficient being diſcovered; after other Aſſets came to the Executors Hands, and a ſecond Bill for the Legacy, and Aſſets thereon diſcovered; and the Lord Chancellor gave his Decree for the Legacy, and Damages from the firſt Bill exhibited; (for that was a good Demand of the Legacy, though it was not proſecuted) and not only from the Time of Aſſets fallen.

This Caſe ſhews, That a Decree founded on a later Bill, may reſpect the Circumſtances of the Caſe, as it ſtood on a former Bill. And even former Decrees may be reverſed, altered or explained on ſubſequent Bills, for Matters ariſing ſubſequent to, or not known at the Time of the former Bill, &c. See 1 Chan. C. 3, 45, 64, 87. and note the following Caſe, & poſt 40, &c.

DE
Term. Sanct. Mich.
Anno Regis 32 Car. II.
IN
CANCELLARIA.

Bevan *versus* Dike. 27 Novemb. 1679.

Relief on Matter not in Issue.
See the Cases, ante & post 40, 196, 251.
Marriage by a Non-Conformist, good.

THE Plaintiff's Wife and Administratrix to her former Husband sues Dike Mortgagee of a Dye-house and Vessels, but the Administration was repealed because she was married, (as it was said at the Bar) by a Non-Conformist Minister: But it was but said, and as to that saying the Chancellor said, it might be allowed as well as by a Romish Priest, or he said to the like Effect; but nothing proved. The Cause being heard, the Court in Regard of the Repeal of the Administration could not relieve her; but in the Proof it appears she had another Title not set forth in the Bill nor put in the Issue, viz. That the Mortgagor before Witness gave 2 s. 6 d. to the Heir, and declared, that the Plaintiff should sell the House, pay the Mortgage, and with the House and Trade of Dying maintain herself and Children, so that it was a Parol Declaration of a Trust.

Object. It is not alledged, nor in Issue, therefore, &c.

Note; Trial of a Fact not in Issue.

Chancellor. Where I see Right, I will have it tried etc I decree against it, and it is no Inconvenience, for the Inconvenience is because the other Side cannot examine to what is not alledged in the Bill, but at the Trial he may, and so directed a Trial on that Point.

Vide post 234, 251.

Anonymus. Novemb. 27. 1679.

Heir help'd againſt Wife Deviſee for Life.
Diſcovery.
Vide ante 1.
Poſt 197.
1 Chan. C. 7, 177.
1 Vern. 431.
Curſ. Canc. 437, 438.

THE Husband deviſed Lands in Queſtion to his Wife for Life, the Son exhibits a Bill pretending the Deviſe to the Wife void, becauſe 25 Eliz. the Lands were entailed to his great Grandfather, to whom he was Heir in Tail; and to diſcover the Deed in Tail, the Wife confeſſeth Writings in her Hand, ſhe is ordered to bring in all the Writings, and it fell out that the Deed of Intail was among the Reſt. The Heir by a Motion ex parte gets all the Writings out of Court, and, on Motion after was ordered to bring them in again, and they are now in Court.

At the Hearing Mr. Keck prays that the Heir may not make the Court an Inſtrument to help the Heir to the Deeds, but that ſhe the Defendant may be in the ſame Condition as ſhe was before the Writings brought in by her in Obedience to the Court, for though the Deviſe was voluntary, and not in Purſuance of Articles in Marriage, yet unleſs the Heir would confirm her Eſtate, he ought not to be aſſiſted by the Court, for there is a Conſideration (to wit) to provide for her as his Wife; and ſo had it been if the Father had in like Manner deviſed to younger Children, for the Conſideration in Law is good, (Wife) to raiſe a Uſe at Common Law.

He affirmed there were Precedents for him, and the rather becauſe the Father had Power to dock or bar the Intail.

Chancellor. I will never help the Iſſue againſt a Purchaſor; but here it is a Bounty in this Caſe, and in ſuch Caſe the Heir having a good Title ſhall be aided; and decreed the Deed to the Plaintiff.

Anonymus. Novemb. 27. 1679.

Real Eſtate made liable to Legacies in lieu of the Perſonal.
Poſt 5, 74, 117.
Qr. 1 Ch. C. 74, 271, 295, 297.
2 Salk. 416.

THE Caſe was. The Father ſeiſed in Fee mortgaged the Land, and gave a Statute to the Mortgagee to pay, &c. and made his Will, and deviſed 500 l. to his Daughter, and died; the Mortgagee took ſo much of the perſonal Eſtate in Execution on the Statute, that thereby there was not ſufficient Aſſets left to pay the Legacy.

The

The Question was now, that seeing the Heir was discharged or eased of the Debt out of the personal Estate liable to the Legacy, if now the Daughter should have Relief against the Heir, who was eased out of the personal Estate which was liable to her Legacy; and it was decreed for her.

Chancellor. Where the Heir is indebted by Mortgage, made by his Father, or by other Means as Heir to his Ancestor, the personal Estate in the Hands of the Executor shall be employed to pay that Debt in Case of the Heir; but if there be not Assets to pay other Creditors or other Ends of the Testator on his Legacies, the Heir shall not turn his Charge on the personal Estate. In this Case here was sufficient to pay the Debt by the Mortgage, &c. and the Legacy out of the personal Estate; and when both can be satisfied, both shall be satisfied; and the Contrivance to make the personal Estate liable towards Satisfaction of the Mortgage (looks like a Fraud) that shall not prejudice the Legatee, but she shall have Recompence against or upon the Mortgage, tho' originally not liable to her. And my Lord cited several Precedents decreed upon the same Reason.

For Equity will take away one Man's unreasonable Gain, in order to make up another's Loss. See 1 Salk. 155. 2 Ventr. 353. 1 Vern. 49, 335, 464. and he who receives the Advantage ought to make the Satisfaction. See 1 Chan. C. 74. &c. ut supra.

Heir, Executor. Post 74. Qr. 84, 85. 1 Ch. C. 74, 271, 295, 297. 1 Vern. 436. 2 Ventr. 349. 2 Salk. 416, 449. Management of the Estate.

Legate *versus* Hockwood. Nov. 27. 1679.

THE Plaintiff bought of the Defendant five sixteen Parts of a Ship, which he had formerly sold by Bill to the Plaintiff, who gave him Bond for the Money, and after the first Bill kept the Bill, saying, he would keep it till he were paid, and being after requested to make a Bill of Sale to the Plaintiff, refused to do it; the Plaintiff pleads, that by Reason thereof he could not dispose of his Interest, for tho' he had Title by the verbal Sale, yet none would deal with him on such Terms without a Bill of Sale to make out his Title, but he did not instance in any particular Person, who refused to deal with him: The Plaintiff sent the Ship to Sea, which made a losing Voyage; at her Return to England, the Defendant then proffered a Bill of Sale, but the Plaintiff refused it, and now sues to have up his Bond, tho' he had not paid the Money.

Money secured by Bond discharged, the Assurance being denied on Demand. Consideration. Assurance.

Chancellor. When the Ship is sold it is implied, that the Vendor should make Assurance by Bill of Sale, but not unless it be demanded: Was it demanded? The

Demand.

The Counsel for the Plaintiff read and proved a Demand,

Kock. Here is a Bargain executed, Security for the Money given, Possession taken by the Plaintiff, and the Ship employed by him and safe returned, and we pray to have our Money according to Security to us for our Ship given, which he hath.

Note; Security for Money, is as Money paid; but the not Delivering the Bill of Sale on Demand, set the Contract at large.

Chancellor. When you had Security you ought on Demand to have made Assurance; if a Man buy Lands and secure the Money, if he who sells will not make Assurance, when reasonably demanded, he shall lose the Bargain, therefore decreed the Bond to be delivered up, and the five Parts, &c. re-assigned to the Defendant.

Fashon *and other Creditors of* Anthony Pearson *deceased, Plaintiffs, against* Atwood *Executor, and* John Atwood, *and against the Debtors of* Anthony Pearson *and* Ralph Pearson *Administrator* de Bonis *of* Anthony Pearson, *Defendants. On the Hearing* 4 Decem. 1679. *The Case was.*

Factor.
Parol Assignment of Debts.
Post 11, 12, 36, 37, &c. 74, 95, &c.

JOhn Atwood a Merchant in Norwich, deceased, imployed Anthony Pearson deceased, as his Factor in London, to sell Stuffs for him, and did charge him with great Sums of Money by Bills of Exchange, many of which Pearson accepted, and finding that he had accepted more Bills than Assets to satisfy, complained thereof to Atwood, who thereupon willed him to go on, and agreed that he should sell the Goods, and dispose of Goods and Debts as his own to secure himself; which he did, and sold to the Defendants, and entred them in his Accounts in his own Name, and the Buyers (some of the now Defendants) knew not whose Goods they were, but bought them of Anthony Pearson; two Days after the Agreement John Atwood, the Merchant died; afterwards Anthony Pearson, the Factor, assigned those Debts so contracted to Packer, another Defendant, to the Use of the Creditors of Anthony Pearson, and dieth. The Scope of the Bill was, That accordingly the said Debts may be employed to the Use of the Creditors of Anthony Pearson according to the Assignment.

B. Atwood, Executrix of John Atwood, opposed it for that she was subject to Demands of divers Persons by Bond, which Debts by Bond are to be paid before any Debts by verbal Agreement; and though Pearson sold the Goods of Atwood to the Defendants, yet Atwood might sue for the Debt in his own Name (which was not denied); and though in Atwood's Life-time he could not avoid his Agreement, yet the Case is altered by his Death; for himself was equally liable to his verbal Agreement as his Bond; but the Executor is not so, for he must pay Bonds before simple Contracts.

Agreement alter'd. Ante 5, 6.

It was said for the Plaintiff. Debts, though not assignable in Law, are on good Consideration assignable in Equity, and though the Property of the Debt be not altered, yet it binds Atwood, the Assignor, and consequently his Executor: So as the one nor the other can avoid it in Equity, and there is no Danger of Devastavit to the Executor; for it cannot come to the Executor's Hands, for the Executor is bound by the Assignment as well as the Testator, and till it come to his Hands, the Executor cannot be charged.

The Attorney General objected. The Creditors by Bond are now concerned, for they ought to be preferred before a verbal Agreement, and the Executors for them in their Behalf.

The Chancellor seemed to incline much against the Plaintiff, but directed a Trial on this Point, viz. If there were any Agreement between the Factor and Merchant, that the Factor should have the Debts for his Security.

Estoppel by Account.

It was insisted on as a Custom between Merchant and Merchant, that all Accounts should be evened on either Side by Way of Estoppel, when the Business was of the same Employment, &c. For in that Case it is fit, That he who will have Equity, must first consent to an Equality, i.e. a Balance of Accounts. Vide post 194, 195.

Temple *contra* Rowse. Decemb. 8. 1679.

No Revivor for Costs only.

A Decree was made, and before Costs taxed, the Plaintiff died, and a Bill of Revivor brought, and disallowed by the Lord Chancellor, On Plea que ne gist pour costs.

Of Bills of Revivor, *vide post* 80, &c. Ibid.

Wakelin

Wakelin *contra* Walthal. Decemb. 8. 1679.

Verbal Agreement no Stay to Execution of a Decree. Vide poſt 33.

A Decree being paſt, the Defendant to a Bill to execute the Decree, ſet forth a Parol Agreement in Bar; to which Anſwer the Plaintiff demurs, and the Chancellor allowed the Demurrer though the Agreement were ſubſequent to the Decree; the Decree ſhall proceed, and if the Defendant will have Advantage of the Agreement, let him bring an Original Bill; for if he have Advantage by it in Way of Defence, one Witneſs may ſerve his Turn; but to an Original Bill here, if he in his Anſwer deny the Agreement, one Witneſs will not convict him, ſo as by this Way of Anſwer the Plaintiff ſhould loſe the Benefit of his Anſwer.

Original Bill.

Anonymus. 9 Decemb. 1679.

Stat. 29 Car. II. Deviſe of a Mortgage. Vide 52, 59, 61, 97, 221, &c.

A Mortgagor after Forfeiture, by Will in Writing, ſince the Statute, and atteſted only by two Witneſſes, deviſed the Land, and upon Trial a Verdict againſt the Validity of the Will; for the Queſtion at the Trial was not on the Point of Equity, whether the Equity of Redemption paſſed by the Will, but whether the Lands paſſed? the Mortgage being then unknown, but diſcovered ſince.

Ignorance.

And now Mr. Eccleſton moved, That this is not within the Statute which nulls ſuch Wills only in Caſe of Deviſe of Lands by Virtue of the Common Law, Statute or Cuſtom; but a Deviſe in Equity is not good either of thoſe Ways.

Deviſe.

Chancellor. I cannot tell that, but before the Statute if a Mortgagee before the Condition broken deviſe, &c. it is void, for a Condition is not deviſable, but after Forfeiture the Equity of Redemption is deviſable.

Hodges *contra* Waddington. 11 Dec. 1679.

Executor, pending a Suit for the Eſtate, voluntarily pays a Legacy, the Eſtate is evicted, he is remedileſs.
Executor.
Eviction.
Loſs.
Poſt 54, 145.
1 Ch. C. 136, 248, 256.
2 Vent. 360.
1 Vern. 94, 162, 455.

THE Queſtion and Caſe was. An Adminiſtrator poſſeſſeth himſelf of the Inteſtate's Goods, and deviſeth Legacies and dies, his Executor voluntarily without Compulſion of Suit pays the Legacy, there then being a Suit in Right of the Inteſtate, to recover the Goods, and after that the Goods are evicted from the Executor; ſo that now he hath not, nor truly had Aſſets for the Legacy: The Executor ſues to have back from the Legatee what he paid, and in Truth was not bound to pay, but voluntarily did.

The Lord Chancellor adviſed: But in the ſame Day in the Afternoon the Lord Chancellor diſmiſt the Bill, becauſe the Executor paid the Money voluntarily without Compulſion by Suit. And 2dly, with his Eyes open when he knew that the Eſtate was in Queſtion, ſo he was aware of the Danger of the Action. If the Suit for a Legacy be in the Eccleſiaſtical Court they make the Legatee give Security, becauſe when the Legacy is paid they cannot reſtore, &c. But here the Court will decrees a Legacy without Security (unleſs in Caſe of Poverty or the like) for this Court can reach the Legatee again if there be Cauſe.

Trethewy *contra* Hoblin.

No Coſts of Trial if the Title not good, but probable.
Vide poſt 208.
Ante 7.
1 Chan. C. 71, 87.

TRethewy purchaſes of Francis Hoblin, Son and Heir of Thomas Hoblin, Lands called Bawdo, and by another Purchaſe purchaſes Penhale Prideaux, and had Mortgage of Penhale ſans Addition, and Penhale Hungerford, the Purchaſe-money and Debt 3000 l. the Eſtate of Penhale and Hungerford was in Reverſion after a Jointure to old Hoblin's Wife.

Trethewy's Bill was againſt Thomas Hoblin, the younger Son, and Hawky an Attorney. The Equity was to diſcover Incumbrances, examine Witneſſes, have up the Evidences and Writings, which the younger Son being Executor to his Father hath, and to be enabled to try the Title, which he could not do without Aid of this Court during the Jointreſs's Life.

A Trial was in Devon for Penhale, but set aside on Certificate of the Judges coram quo, &c. And a new Trial in Banco Regis by a Jury of Middlesex touching Penhale, which past against Trethewy, and a Trial for Bawdo, which was claimed by Hawkey, which past for Hawkey.

The Cause was now heard again 16 December, 1679.

No Costs on probable Cause of Suit.

The Point in Debate was, Whether Trethewy, who had lost his Money and Security, and had a probable Cause of Suit, should pay Costs at Law or here?

The Lord Chancellor ordered not any, but the Defendant might enter Judgment at Law, but no Costs there.

Green & Mary *Uxor*, *contra* Hayman, &c.
19 Decemb. 1679.

Estates transposed to maintain the Intent of the Will. Devise.
Vide 1 Ch. C. 239, 177.
1 Vern. 425, 482.
Winch 59.

THE Case was. George Rook, Grandfather of Mary, seized in Fee, devised the Lands in Question to Lawrence his Son, Father of Mary the Plaintiff, and also of the Defendant Hayman Rook for the Life of Lawrence only, Remainder to the first Son of Lawrence, and the Heirs Males of such first Son, and so to the other Sons in præfat' terminis; the Remainder to John Brown and Lancelot Johnson, &c. for their Lives on Trust and Confidence in them reposed for the better Securing of the several Remainders before limited; the Testator died, Lawrence before any Son born, by Lease and Release makes J. S. Tenant for his Life, and suffers a Common Recovery to the Use of himself again for Life, and a Remainder for Years to the Trustees to raise 1000 l. Portion for his eldest Daughter, and then afterwards hath Issue the Plaintiff Mary and the Defendant Hayman Rook, his Son and Heir, and dieth. The Suit is for the 1000 l.

The Defence by Plea was, That Brown, &c. the Trustees, to preserve the Contingent Remainders to the first, second, &c. Sons, are living, and consequently the Estates contingent not barred by the Recovery.

Against which it was objected, that Lawrence, till a Son born, was Tenant in Tail, and the Estate to Brown, &c. a Remainder after, and not before the Entail to Lawrence, and

so is barred by the Recovery, and could not preserve itself, a fortiori, not the contingent Remainders prerevent.

After Debate the Lord Chancellor allowed the Plea, for the Law will manage and marshal the Will according to the Intent, which here was to preserve contingent Estates limited in Place after the Contingencies; but if it so should stand in Construction of Law it cannot preserve them, therefore clearly shall be construed before them. Intent.

William Mellish *Esq; Plaintiff; the Royal* African *Company and* Richard Edlin, *Defendants.*

The Case.

IN October, 1672. the Company chose the Plaintiff to be their Agent General and President of their Council at Cape Corsa in Africa, which Council was to consist of the Agent General, and a first Merchant, and a second Merchant; the first Merchant was to be Gold-taker, the second Merchant Warehouse-keeper, and the Plaintiff was to have a Salary of 400 l. per Annum, two third Parts of which was to be paid in Africa, and the other third Part in England, when the Company had allowed his Accounts; and the Company gave the Plaintiff an Establishment or Rules by which to guide himself; and by which the Out-Factories were also to be guided; by which Establishment the Out-factories were to send their Accounts to the Company of all their Transactions, and gave the Company Security to be accountable to them for all what they received and paid for them. And the Plaintiff and Council were also to take the Accounts of the Out-Factories and enter them in their Books, which were kept for the Company at Cape Corsa Castle. Factor. Merchants of the African Company. Ante 6. Post 36, 37, 56, 57, 74, 95. 1 Chan. C. 27, 30, 76, 127.

All the Time the Plaintiff was there (which was three Years) the Defendant Edlin was (for want of a third Person) both Gold-taker and Warehouse-keeper.

The three Years being ended, the Plaintiff and Edlin came Home, and having delivered up his Accounts and Papers to Mr. Hodgkins his Successor at Cape Corsa, sent the Company, according to their Establishment, just Accounts from Time to Time of all their Transactions.

The Plaintiff expected the Remainder of his Salary, but the Company sued him at Law for all their Goods sent, and got Judgment (Quod computet.)

To be relieved against which Suit, and have the Remainder of his Salary, is the Scope of the Bill.

13 July, 1675. The Cause came to be heard, and decreed,

1st. That the Plaintiff should account with the Company as their Agent General in the said Trade at Cape Corsa Castle.

2dly. That Edlin should be admitted Warehouse-keeper throughout the Plaintiff's Ageney.

3dly. That in making the Account the Plaintiff is to be discharged of all Goods delivered into the Warehouse at Cape Corsa Castle, and went to the Out-Factories and were delivered there, or that were not delivered there through the Default of the Master of the Ship, or any other Accident.

4thly. That the Plaintiff should be charged with all Goods belonging to the Company, which he, or any by his Order, took out of the Warehose and disposed of; and with all Goods that went to other Factories, which were afterwards imbezzled by him or his Order, or for his Use.

5thly. That the Plaintiff should be charged with such of the Company's Goods as came to Cape Corsa Castle, and were not delivered into the Warehouse, nor consigned to any other Factory, but came to the Plaintiff's Hands or Use.

6thly. And if any Goods came to any Out-Factories, and Product had been answered the Plaintiff, and he hath not answered it to the Company, the Plaintiff is to be charged therewith.

7thly. And that in this and all other Matters of the Account, wherein the Plaintiff is charged, he shall not be allowed any Thing in Discharge, but what he proves.

And that in all Cases not before directed where Edlin may be charged, the Plaintiff is to be discharged.

That this Order was entred according to the Minutes, and the Defendants acquiesced under the Decree so far as to bring in their Charge before the Master, and accepted a Discharge, and took a Warrant to attend the Master on the Discharge.

But inſtead thereof petitioned the Lord Chancellor to rectify the Order, and would have the Plaintiff charged with the Monies demanded by the Out-Factories, in their Accounts which they ſent the Plaintiff during his Reſidence at Cape Corſa, the Petition alledging that near 1000 l. is demanded by the Plaintiff in his Accounts in Groſs for Charges allowed by him in the Accounts of the Out-factories, without the Producing the Vouchers.

In Anſwer to this Petition, the Plaintiff ought not to be charged with the Demands of the Out-factories, for he knows not, nor is concerned, whether thoſe Demands be juſt or unjuſt, nor can he allow or diſallow of them, but muſt take them as they were given; and if they are falſe Accounts, the Out-Factories are liable to the Company, to whom they by the aforeſaid Eſtabliſhment are to account and give Security ſo to do.

Vide the thirteenth Article in the Eſtabliſhment, to prove the Company did direct the Under-factors ſhould all account to the Company in England, of all Goods they received and ſold, and ſend to the Company by every Ship a Copy Journal of all the Proceedings; and notwithſtanding that Accounting to the Company in England, they were to account to their Agent and Council at Cape Corſa, ſo as they might inſpect all their Actings, and keep perfect Accounts with them in the Companies general Books at Cape Corſa. Vide the Securities the Company uſually took of all their Factors in Guinea being in their Cuſtody.

2. It is not reaſonable to charge the Plaintiff with what he never received, for the Out-Factories returned him no more Effects than what came clear after the Deduction of their Demands; which Deductions were made by themſelves, and not by the Plaintiff; nor could the Plaintiff and Council at Cape Corſa refuſe ſuch Effects as they ſent or brought thither; if they had, the Company might have complained for that Cauſe.

3. As to the Allegation of the Petition, that the Plaintiff demands groſs Sums for Charges allowed in the Out-Factories Accounts, there is no ſuch Thing, the Plaintiff making no Demands; there being only entred, according to the Company's ſaid Eſtabliſhment, in the Books kept at Cape Corſa for the Company, the general and total Sums demanded by the Out-factories for what they diſburſed; nor is there any Occaſion for the Plaintiff to make any ſuch Demands; for being not chargeable with what Goods were ſent to and received by the Out-Factories, he cannot be charged with their Diſpoſal of them, and ſo hath no Occaſion to demand any ſuch Allowance.

4. As

4. As to the Charging these Accounts in the Company's Books kept at Cape Corsa Castle in gross Sums, it was no Crime, in Regard it was the Usage, and also for that by the Company's said Establishment the Out-factories were themselves to render an Account of all their Receipts and Payments, and for that Purpose gave Security, as aforesaid, to the Company, and the Plaintiff and Council had the Vouchers at Cape Corsa Castle when these Sums were entred.

5. And as to the Objection, that the Out-Factories Accounts themselves are not produced, the Company by their Letter dated 25 January, 1675. gave Mr. Hodgkin Order to take from the Plaintiffs and Edlin all their Concerns; whereupon never having any Order to bring them or send them to the Company, and seeing the Company's Order, delivered up all the Out-Factories Accounts and Letters, which were many Thousands, to Hodgkins, who was proper to have them, that he might see how Matters stood; which Papers were, since the Plaintiff came to England, burnt by one Croxton, the Company's late Agent, with which the Company being not satisfied petitioned the Lord Chancellor for these Accounts, who the 22d of March last ordered that the Plaintiff should swear he left them with Hodgkins, which should conclude the Company, which the Plaintiff had done. Vide Order and Affidavit.

Company's Letter to Agent Hodgkins to prove this Order.

Ja. Nightingale proves the Burning of the Papers.

Of Accounts between Merchants and their Factors, see 1 Chan. C. 25, 30, 76, 127, 262. 1 Chan. Rep. 146, &c. Ante 6, & post 57.

DE
Term. Sanct. Hill.
Anno Regis 31 & 32 Car. II.
IN
CANCELLARIA.

Bodly *contra* ——

BOdly gave Bond of 500 l. to the Brother of the Defendant, conditioned to pay to the Defendant's Sister (Party also to the Bill) 50 l. and to maintain a base Child paying a certain yearly Sum for it. There was no Place in the Condition where the 50 l. should have been paid. The Plaintiff by his Bill offers Payment of the 50 l. and brought it into Court, and the Defendant set forth by Answer that the Plaintiff was Suiter to her in Way of Marriage, but abused her and left her, and thereupon the Court refused to grant an Injunction to the Plaintiff against the Suit on the Bond; the Plaintiff replied and acknowledged he was a Suiter, and really intended Marriage, but that after he had begun to woe the Woman, he was informed, as the Truth was, that she had formerly been taken in a Bed with another Man, and that this was known publickly, and her Father trepanned him to woe her, &c. he being a young Man in Oxford. Yet now the Lord Chancellor denied the Injunction, saying, this Court should not be a Court to examine such Matters.

Iniquity takes away Equity. Post 17, 102. 1 Chan. C. 97, 154, 202, 250, 293. 1 Vern. 29, 40, 53, 120, 167, 244, 245, 262, 294, &c. 350, 450, 467. 1 Chan. R. 95. 2 Chan. R. 247, 360.

Injunction. Post 164, 203.

Winkfield

Winkfield *contra* Combe. 1679.

Accident, Teſtament.
Deviſe to a Child in ventre ſa mere, which is born and dies, extended to ſubſequent Child in ventre, &c.
See 1 Chan. C. 77, 301. M. 28, 29. 1 Vern. 460, 180, 247.

F. Winkfield having a Son and other Children married the Plaintiff's Mother, and five Years before he died made his Will, and taking Notice therein that his Wife was enſeint, deviſed 1000 l. to the Plaintiff; and if the Child en ventre ſa mere were a Daughter, then ſhe ſhould have 1000 l. but if a Son, then that his Executors ſhould purchaſe 100 l. per Annum, and ſettle the ſame on the Son and his Heirs Males of his Body, and if he died without ſuch Iſſue, to the Plaintiff; the Wife is brought to Bed with a Son, who died in the Life-time of the Father; then the Father died, and the Wife enſeint with a Daughter, to whom no Portion was left or other Proviſion. And the Plaintiff exhibits her Bill to have the Land purchaſed and ſetled on her; for if Lands be deviſed in Tail, the Remainder over, the Deviſee dieth without Iſſue, the Remainder ſhall take Place, and there is the ſame Reaſon here.

Chancellor. In Caſe of a Deviſe I cannot help where the Law fixeth the Eſtate, but if you come to have Relief in Equity, and there falleth out an unſeen Accident, which if the Teſtator had foreſeen, he would have altered his Will, I ſhall conſider of it; here he meant in Caſe he left a Daughter born after his Death, ſhe ſhould have been provided for; and though it happens that his Wife had no ſuch Daughter, (viz. whereof his Wife was enſeint at the Time when he made his Will, and to which Daughter only the Words of the Will extend) yet here is the ſame in Effect. A. having only a Daughter deviſed his Truſtees ſhould convey the Land to the Daughter in Fee, the Teſtator recovered, and after had a Son, the Daughter ſhall not carry the Land from the Son. And now the Lord Chancellor directed a Bill to be brought, whereto the Poſthuma Daughter ſhould be a Party, and both Cauſes to be heard together.

Anonymus.

Anonymus. *The same Day.*

Where the Agreement for a Marriage, which shortly, viz. within seven Weeks, was had, but in the Interim the young Man had made Addresses to another, but the Agreement was reduced into Writing and not sealed, and was extream, that the Daughter and her Husband would have more than the Father (indebted) and the Mother, and two other Daughters unpreferred would have left.

Unreasonable Agreement not decreed.
Ante 15.
Post 102, 250.
1 Vern. 53, 452.
1 Chan. C. 96, 154, 202, 250, 293.

The Lord Chancellor did not decree the Agreement; but if the Plaintiffs could recover at Law, he would leave them to that Remedy: It was referred to the Parties to agree among themselves, else to attend again.

Elton *contra* Waite *and* Harrison. 18 Feb. 1679.

THE Lady Anderson, Grantee of an Annuity for Years, made her Executor, who married Harrison; he being indebted to Waite and others, agreed with Waite to assign the Annuity to him for Security, and the Grant of the Annuity was delivered to Plucknet, a Scrivener, to draw the Assignment; but before it was perfected the Executor died; the Plaintiff took Administration de bonis non, and sueth for the Arrears the Grantor and the other Defendants for the Deeds, and had a Decree accordingly, though it was objected, that the Husband had Power to grant and alter the Property; and this Agreement was in Equity an Administration, and the Defendants had paid some of his Debts in Confidence of Performance of the Agreement.

Agreement of the Husband of the Executrix binds not. Executor.
Vide post 27, 32.
1 Chan. C. 255, 298.

Lloyd *contra Philips.*

A Decree in the Marches to account, and the Bill here to be relieved, because the Witness is out of the Jurisdiction; but upon Demurrer dismist.

Note; Witnesses examined upon the Account below.

Marches. Jurisdiction.

The Attorney General *contra* Combe. Friday 27 Febr. 1679.

Charitable Uſes. Vide poſt 32, 94. 1 Chan. C. 135, 158, 193, 195, 267, &c.

J. S. ſeized of Land in Fee by his laſt Will in Writing devised 10 l. per Annum for ever (ſo long as there ſhall be a weekly Sermon every Saturday in St. Albans, to be choſen by the greateſt Part of the beſt Inhabitants) out of all his Lands in D. he being alſo ſeiſed of Lands per auter vie; Quære 1ſt, As to the Party who ſhould have the 10 l. 2dly, What Lands ſhould be charged with it, and whether the Arrears ſhould be paid, becauſe no Sermon hath been had on Saturdays for many Years, was debated; and the like for a Lecture in Hampſtead, &c.

It was objected that theſe Bequeſts were not within the Statute of 43 Eliz. which makes Appointments to Charitable Uſes therein mentioned good, and appoints them to be executed by the Commiſſioners, and therefore are not good by the Common Law, if the Deviſe it ſelf, whereby they are raiſed, be not good; and here the Deviſe is to no Perſon, and Part of the Land intended to be charged was but an Eſtate pur auter vie, not deviſable, and is deviſed no longer than while a Sermon weekly, which hath not been there of long Time.

Chancellor. So long as ſhall be, is ſo long as may be. 'Tis true, a Lecture is not within the Statute of 43 Eliz. but the Statute of 43 Eliz. took Patern from 1 E. 6. made to take away Superſtition, and doth make Uſe of the ſame Expreſſions, when it is to advance true Religion and Charity, viz. Given, Limited, Appointed, &c. Summa eſt ratio quæ pro Religione facit. In this Caſe there was Charity, but it is Charity miſtaken, to be choſen by the greateſt Part of the beſt Inhabitants, which is a wild Direction, &c. He cited the Caſe where a Gift was to maintain a ſuperſtitious Inſtitution ſo long as the Law would allow, turned, when the Law did abrogate, that Superſtition to a good Uſe, and decreed that the 10 l. per Annum ſhould be to maintain a Catechiſt there, to be approved by the Biſhop; and the Arrears from the Time of the Reſtauration of the King, to be imployed in Purchaſe of Lands to better the Maintenance, and the Lands per auter vie to come in Proportion with the Reſt.

Lands pur auter vie decreed, tho' not expreſs'd in the Deviſe.

Vide the Order, 1st. For the Annuities to maintain Lectures (not Sermons) are thereby also decreed.

2. One Charity devised, another decreed.

3. A void Devise to Charity not within 43 Eliz. decreed.

4. Lands pur auter vie devised to Charity, decreed, tho' the Charity not within 43 Eliz.

Perne *contra* Oldfield.

CHapman seised of the Rectory of Crowland, in Com. Linc. 11 Jac. conveyed the same to the Use of such Persons as should be lawfully appointed to serve the Cure of Crowland for ever. Curate not removable. Postea 31.

The Church is impropriate ab antiquo, and no Vicar instituted.

The Statute of 18 Car. 2. enables Gifts, &c. to Curates; the Heir of the Donor names Perne for Curate; Oldfield is named afterwards and instituted, but it was pendente Lite; but now said that there being several Owners, &c. Oldfield was put in by another, and the Plaintiff is revoked.

Chancellor. By the Ecclesiastical Law no Man ought to be ordained sine titulo, that there might not be mendicant Preachers; and I distinguish between Curates where the Church is become Lay by Impropriation, and where not; for the Curate once put in and having a certain Maintenance, he shall not be dative, and removable at Pleasure, for that were to lay a Foundation of Simony for ever.

Quære, If this Reason go not to Bonds made to resign, &c. Bonds to resign, vide post 186.

Anonymus. 1679.

A. Sells to B. with Covenants only against A. and all claiming by, from or under him. B. secured the Purchase-Money, but before Payment the Land was evicted, but not by any Title under A. but by a Title paramount. B. sued to be relieved, that he might not be forced to pay, seeing the Land was lost, and was relieved by the Lord Chancellor, ex relatione Churchil. Money stopt because Land evicted from the Purchasor. Covenant. Eviction.

Note. 1st. If Declaration at the Time of the Purchase treated on, that there was an Agreement to extend against all Incumbrances in general, and not only special, it could not have been admitted.

2dly. The Affirmative Covenant is negative to what is not affirmed, and all one as if expresly declared, that the Vendor was not to warrant but against himself, and the Vendee to pay, because Security absolute without Condition.

3dly. Quære, If this may not be made Use of to a general Inconvenience, if the Vendee, having all the Writings and Purchase, is weary of the Bargain, or on other Respects sets up a Title to a Stranger by Collusion.

Nota. In many Cases it may easily be done, &c.

Blackston *contra* Moreland. 1 March, 1679.

Mortgage.
Incumbrance.
Notice.
See 1 Chan. C. 34, 38, 143, 232, 252, 292.
Ante 6.
Post 47, 48, 122, 126, 161, 246.
1 Chan. C. 149, 162.
Post 35, 213.

Porter had an Annuity charged on the Manor of, &c. Moreland had an Estate in the Manor liable to the Annuity; Blackston had an Estate subsequent to both, by Way of Mortgage; Moreland having no Notice of Blackston's Interest, treateth with him in the Reversion in Fee, who desired to borrow Money of him, and thereupon he agrees and purchaseth Porter's Interest, and for that and Money lent to the Reversioner, buys in Porter's Interest, and pays 900 l. Part to Porter, Part lent to the Reversioner, there being no more than 500 l. due to Porter.

The Question was, whether between Moreland and Blackston (who now exhibits his Bill to pay off Porter and Moreland their Debts) he should pay more than was due to Porter, more than 500 l. and the Mortgage-Money due to Moreland. He is decreed to pay the whole 900 l. but otherwise, if Moreland had Notice of Blackston's Incumbrance.

Grosvenor, *Plaintiff*; *and* Cartwright, *Administratrix of* Thomas Cartwright, *Defendant*.
3 March, 1679.

Resolved and decreed by the Lord *Chancellor*.

An Executrix or Administratrix receives in Money, which was secured to the Testator; if she lend it out to Profit, she shall not account for the Profit, for she lends the Principal at her Hazard, so that if it miscarry she shall make it good to the Estate.

Interest. See 1 Chan. C. 211, 258. Post 35, 150, 152, 153, &c.

A Difference was endeavoured to be put on this Rule, viz. That where the Debt was paid in by the Creditor without her Compulsion, there she should not answer Profit made by lending it out again; but where the Money was lent by the Testator on good Security, and such Security continued good, and the Executrix calls in the Money, and lends it out again; that there she should answer the Profit she made; for it was her voluntary Act, and is in Effect to deprive the Children of the Benefit of the Money, till the Infants come of Age, and turn it to her self, which being for a great Sum, as in this Case it was, for many thousand Pounds, will be great Gain to the Executrix, and Loss to the Children, for whom in Effect she is trusted; this was earnestly pressed: But

Executrix calls in, and receives a Debt well secured, she shall not pay Interest, tho' she lends it out on Profit.

The Lord Chancellor. It is a fixed Rule of the Court, and I will not change it; but she shall forthwith discover what Monies she hath, or hath received of the Estate on such Security or otherwise, and for the Time past she is not to be charged, but shall hereafter lend none of the Money, without Leave of the Court; and such Monies as she hath lent, she shall discover the Securities to them, and if they like them, and so declare their Acceptance, you shall have the future Profits of the Money lent, else not.

If the Plaintiff reply to an Answer, and without Rejoining and Giving Rules for Publication, bring the Cause to an Hearing, the Answer shall be taken wholly true, as if there had been no Replication; for the Opportunity, which the Defendant hath to prove, his Answer is taken from him.

The Course of the Court.
See Curs. Canc. 149 to 153.
1 Vern. 253, 140, 351.

Simpson

Simpſon *and* Field. 3 Martii, 1679.

The Caſe.

A Surety not bound by Law, ſhall not be bound in Equity.
See 1 Chan. C. 77, 97.
Poſt 194, 195.
2 Vern. 39, 235, 524, 751.
M. 71.

J. S. was indebted to J. D. by Bond of 1000 l. to perform an Award; by the Award was due 250 l. to the Obligee. J. D. put the Bond in Suit againſt J. S. A Bill is exhibited here to be relieved againſt the Suit, and an Injunction awarded on Recognizances to abide the Order on Hearing. Field and the Obligee are bound in the Recognizance, which was penned to pay what ſhould be reported due by N. H. a Maſter, named in the Defeaſance or Condition; but the Maſter died before any Report made, and ſo alſo did the Obligor, who died inteſtate, worth nothing: By the ſtrict Penning of the Defeaſance, the Recognizance is not ſuable at Law, becauſe no Report was made by the Maſter. The Obligee, becauſe he could not proceed in the Cauſe, without reviving the Suit, which was abated by the Death of the Obligor, who was one of the Plaintiffs in the Bill, procured Adminiſtration of the Obligor, to be taken in the Name of a poor Fellow, and in his Name revived the Cauſe, and brought the Cauſe to an Hearing, and a Reference to a Maſter to take Account of the juſt Debt, who reported 300 l. due.

Abatement by Death.

The Queſtion was, if the Sureties ſhould be charged: 'Twas objected that this is a manifeſt Fraud and Practice of the Obligee to bring a Charge on the Surety, who was not bound by Law; and the Practice is plain, for the Reviver is by the Adminiſtrator, which no Man would do to charge himſelf; but this was anſwered and every Day done, when a Cauſe cannot proceed for Want of Parties, viz. Adminiſtrator, &c. to take Adminiſtration, &c.

But the great Queſtion was, if the Surety, who was not liable in Law, ſhould be made liable in Equity; for the Plaintiff had good Remedy for a juſt Debt, and juſtly proceeded to recover it; but the Court ſtaid his Suit, and takes ill Security, which proves ſo, and the Debt loſt thereby, and therefore the Court is bound to do us Right; and the Intent of the Court was, that the Debt, if due, ſhould be ſecured; and the Intent was not with Reference to this or that Maſter's Report; for ſuppoſe that the Court had, during the Life of the Parties transferred the

References to another Master, and he had made a Report, that should have bound; and in Case of a Bond lost, this Court have made a Surety to pay it. Yet the Lord Chancellor contra; for the Party is but a Surety not bound by Law.

Report. Post 179.

Bromley *contra* Hamond. 4 March, 1679.

THE Father and Mother Tenants for Life, the Remainder to the Son in Tail by Marriage-Settlement, on great Consideration, the Father and Mother mortgage the Lands to J. S. in Trust for one Marshal a Scrivener; the Father, as was alledged, made Oath before the Mortgage that he was seised in Fee; the Father died, Marshal doubting or finding his Security bad, gave 20 to one to procure the Son to borrow 100 l. of him, but did not at all discover that the 100 l. was his; the Son did borrow the 100 l. and mortgages his Lands for it, and this was conveyed to J. S. who had the Father's Mortgage; and the 100 l. not being paid, a Bill is exhibited to foreclose the Son of Redemption, which was decreed; then Dr. Mills purchaseth by Way also of Mortgage; the Son, after the Day appointed by the Order to pay the 100 l. tenders it with Damages, but was refused. The Decree was inrolled, but that was done with such Speed, that the Advantage thereof was waived.

Remainder Man; Son of the Mortgagee, lends more Money on a second Mortgage, the first being bad.
Post 164, 37, 98.
1 Vern. 244, 5.
1 Chan. R. 14, 106, 142. M. 30.

And now the Matter insisted on was, that the first Mortgagee having a defective Assurance, now having gained a good Title in Law to the Lands, and the Plaintiff having no Title at Law ought to redeem both Mortgages, and pay the Money of both Mortgages, or not to redeem it at all: As in Sir John Fagg's Case, who having purchased on a defective Title for a small Sum, obtained into his Hands the Deed of Intail against him.

Chancellor. The Son is a Stranger to the Father, and all one as a Stranger, and differs from Fagg's Case, and decreed a Redemption on Payment of the 100 l. Damages and Costs. The Mortgagee did oppose the Redemption by his Answer; but as to the Practice in gaining the second Mortgage, it is not material, for he did nothing but to secure a just Debt.

Costs.

Axtel

Axtel *contra* Axtel. 4 March, 1679.

The Case.

Election.
Devise.
Eviction.

THE Husband devised three Tenements, and one called Cox's Tenement, to his Wife in Satisfaction of her Dower, with Election to her to take one or the other, the Dower or the Legacy; afterwards he sold Cox's Tenement, and died without new Publishing the Will. The Wife insists to have Satisfaction for Cox's Tenement, because her Husband gave her that with the Rest as in Satisfaction of her Dower, to which she is intitled. And the Plaintiff cannot bar her of her Dower by the Will; but the Lands devised are but Church Leases. And (said her Counsel) she asketh nothing of the Court, but that she may have only what the Law giveth her.

Chancellor. She must take the Will as it was at the Time of the Death of her Husband, for till then 'tis no Will; let her choose one or the other, she may not have both; and decreed accordingly.

Note; Not only the Devisee's Election, but even his Right or Title to the Estate or Thing devised, may be destroyed by any subsequent Equivalent Act of the Devisor; for the Will being ambulatory and revocable till the Testator's Death, his Sale or other Disposal of the Estate, &c. is a Revocation of the former Devise, and consequently in this Case deprives the Devisee of the Benefit of that Election formerly devised to her. What will be a good Revocation of a Deed or Will, &c. vide 1 Chan. C. 126, 185, 263, 264. and the Cases there cited. Also 3 Chan. C. 106, 107, &c.

DE

DE Termino Paſchæ;

Anno Regis 32 Car. II.

IN CANCELLARIA.

——— *contra* Wilkinſon. 1 May 1680.

Bonds taken by a Grandfather in Name of the Grandchildren, is a Provision, and no Truſt. Vide 1 Chan. C. 85, 296.

J. ſeiſed of Lands and Houſes in Fee, by his Will in Writing, deviſeth to A. Lands of 100 l. per Annum in Fee, to be ſet out by his Executor, and 5000 l. to one Kinſman, and 3000 l. to another, and dieth: The Executor ſets out to A. Lands for 100 l. per Annum, which were worth more, and thereby the Lands and Houſes left are not ſufficient to pay the 5000 l. and 3000 l. The Legatees exhibit their Bill to avoid the Setting out of the Lands.

Account of Legacies.
Legacies abated in Proportion.
2 Salk. 416.
Poſt 132.
2 Chan. R. 218.
2 Vent. 360.
1 Vern. 31, 94, 335, 472.
1 Chan. C. 32, 136, 256.

The Defence made againſt it was; 1ſt. That the Deviſe of the Lands was a ſpecifick Legacy, and conſequently not to come in Average with the other Legacies.

But the Lord Chancellor decreed, That it was not a ſpecifick Legacy, but quantitatis, and therefore if there were not ſufficient, each ſhould bear his Share in the Loſs. But then it was objected, That it was not practicable in this Caſe, becauſe that A. had for valuable Conſideration alienated ſome Part of the Lands.

The Lord Chancellor decreed, That Sir J. C. a Maſter of the Court, examine the Value of the Lands and Houſes, what they were worth to be ſold at the Teſtator's Death; and if A. had more than his Proportion of the whole Value, to pay for it.

Ebrand *contra* Dancer. 7 May 1680.

Bonds taken by a Grandfather in Name of the Grandchildren, is a Provision, and no Trust. Vide 1 Chan. C. 28, 296.

THE Grandfather takes Bonds in the Name of his Children being Infants, the Father being dead.

Chancellor. There is Difference in the Case, where the Father is dead and where he is alive; for when the Father is dead, the Grandchildren are in the immediate Care of the Grandfather; and if he take Bonds in their Names, or make Leases to them, it shall not be judged Trusts, but Provision for the Grand-child, unless it be otherwise declared at the same Time; and decreed accordingly on that Reason, though there were other Matters.

Admiralty. Merchant.

Nota, Eodem die 7 Maii, ex relatione Mr. Finch Solliciter. A Ship broke the Ship of If. who sued in the Admiralty the Ship for Recompence: J. D. became Bail for the Ship, in the Court of Admiralty; whereupon the Ship being discharged, was sold to the Defendant: The Surety in Proceeding was condemned in the Admiralty; he sueth here to be relieved and dismist: Ex relatione Mr. Finch, Solliciter General.

Thomas, &c. *contra* Lane *Widow.*

Devise of a House; Q. if it carries a Garden.

JEffery Thomas had four Children; John his eldest Son, Father of the Plaintiff; Grace, married to Lane deceased; Elizabeth and William: And by his Will devised his Part of a House in Exon, to Grace, and other Houses: one to Elizabeth, another to William, with this Clause, That if any other of his said Children died, his Part should go to the Survivors: He died: John, Grace and her Husband, and William, came to an Agreement with John, which was executed by Writing, and Possession accordingly, near 20 Years: John devised the Lands to raise Portions for two of the Sisters; his Daughters were paid their Portions; the Plaintiff is the third, and sueth to have the Agreement stand; for Lane the Widow sued at Law, and recovered Part of the Lands, which by the Death of John accrued to her, Eliz. and Will. The Decree concerned Lane only, because of her Coverture at the Time of the Agreement. The Case as to her, that by the Agreement, whereas the

House, viz. a Part of it was devised to her only for Life, John was to convey it and a Garden, and Curtilage adjoining, to her for her Life, Remainder to her Daughter Rebecca for her Life, by Deed; and a Covenant in the same Deed, to estate the Husband of Rebecca or her first Child therein also, after her and Rebecca; and though the Agreement and Execution thereof, could not bind her, yet she, after her Husband's Death, having entred into the House, and also the Garden and Curtilage, (which was not devised to her; for though a Messuage devised will carry a Garden and Curtilage, yet the Devise of a House will not, especially being devised without the Words cum pertin', or the like,) hath now, since she became sole, consented to, and taken the Benefit of the Agreement made during her Coverture.

Messuage includes a Garden, &c.

The Defendant answered, That the Addition of the Estate to her Daughter, &c. and his Entry into the House and Enjoyment of it, could not bind her, nor conclude her Consent to the Agreement, for she had Title to it by the Will, for it is the same which was given by the Will, and no more; for the Garden is but a small Piece of Ground, but a Poll, and no Passage to it but through the House, (as the Counsel said.)

Consent. See 1 Chan. C. 208.

The Lord Chancellor dismist the Bill, but ordered, that no Benefit be taken of the Agreement, or Deed made thereon by Grace or Rebecca, (who was one of the Defendants,) because Grace is not to be bound, being Covert, and cited the Case 7 E. 4. the Wife received Money during the Coverture.

Covenant binds not a Feme Covert. Vide ante 17. 1 Chan. C. 255. & infra.

Sidney *contra Earl of* Leicester.

LEicester House, on the Marriage of the now Earl of Leicester, then Lord Lisle, with the Daughter of the Earl of Salisbury, was setled on Robert late Earl of Leicester for his Life, Remainder to the now Earl for his Life, Remainder to the first, second, &c. Sons of the now Earl in Tail, &c. The Marriage took Effect; the now Lord Lisle, first Son, is born: Earl Robert makes several Contracts with divers Workmen, to build on Leicester-fields near the House, and in Part settled before, and Leases for 42 Years (whereof now 14 are expired) were made accordingly; but after the Buildings were begun and proceeded in,

Consent by Parol, binding. Vide ante 17, & supra. 1 Chan. C. 208.

the Builders begun to leave off, becauſe they had Notice of the Settlement. Earl Robert thereon writes to his Son the now Earl, for his Conſent, that the Buildings might proceed, and that he would conſent; for the Ground before the Building was but 4 l. per Annum, and the Rent at preſent, during the Leaſes, is raiſed to 53 l. per Annum, and by Improvement after the Leaſes, will be 2000 l. per Annum. The Conſent of the now Earl was proved, and he is decreed to confirm the Leaſes, though the Conſent was but verbal, and ſaid it was for the Benefit of the Family.

Conſent verbal, obliging.

But whether the Lord Liſle, who was in Remainder in Tail, ſhould be decreed to confirm, the Lord Chancellor would adviſe.

Note; He acted and did negotiate between his Father and Grandfather to procure his Father's Conſent, not only during his Nonage, but alſo after his full Age.

Hele *contra* Hele. 1680.

Agreement for Jointure.

THE Plaintiff, Widow to H. Hele, ſued for her Jointure; the Bill was founded on an Agreement, whereby for 3000 l. paid in Money, viz. 2300 l. and 700 l. by Aſſignment of Bonds, H. Hele covenanted to ſettle 300 l. per Annum in Lands for her Jointure, and 40 l. per Annum Rent was granted to her before Marriage to bar her of Dower; but this was only in Proof, not in the Bill.

The Defendant by Anſwer ſets forth, The Will of Samuel Hele, elder Brother of Henry, whereby he deviſes his Lands to Henry for Life, Remainder to firſt, ſecond, &c. Sons of Henry in Tail, ſucceſſively, the Remainder to Richard a Couſin, in like Manner, with Remainder to others in like Manner; but in the Will a Power was given to Henry to limit the Capital Meſſuage and Lands, which are called Fleet, to any Wife; but he executed not this Power; and whether that Henry dying before any Execution accordingly, the Court ſhould decree it, it being a new Caſe, the Cauſe was put off till another Day.

Power, not executed, &c. Vide poſt 29, 30, and the Caſes there cited.

Meeker

Meeker *contra* Tanton. 10 May 1680.

THE Bill was against the Heir of the Mortgagor to have Payment, or hold without Redemption; and because the Administrator of the Mortgagor was not made Party, the Cause being opened at Hearing, the Plaintiff could not be admitted to proceed, for in all Mortgages the Money must go to the Executor or Administrator, and not to the Heir.

Mortgage.
Party.
Executor.

Vide post 52, 115, 116, 221.
1 Chan. C. 98, 286, &c. ibid.

Elliot *and* Hele *contra* Hele. 11 May 1680.

ELliot, Father of Hele, the other Plaintiff, set forth, That Sir Henry Hele seised in Fee of divers Manors, &c. in Com. Devon, Cornwall and Somerset, in Consideration of a Marriage with the Plaintiff Hele, and 3000 l. did agree to settle Lands of 300 l. per Annum on the Plaintiff for her Jointure, and the 3000 l. paid and secured, and prays Performance.

The Defendant sets forth, That he knew not the Agreement, but said he claimed not under Sir H. Hele, but by the Will of Samuel Hele, elder Brother of Sir Henry, who by his Will devised the Lands in such Manner as thereby appeareth, not shewing how, but that the Plaintiff could have no Jointure, saving that some Lands did descend to him in Fee.

The Cause coming to be heard, was thus, viz. Sam. Hele, elder Brother of Sir Henry, seised in Fee of divers Manors, & inter alia, of Fleet Damarel, Capel Mosse, &c. devised all (except some Parcels) to Thomas Carew, and others in Fee, on Trust to raise 10000 l. Portions for his Daughters, and pay his Debts; and this by Sale of all or any Part, and by Leasing as they should think fit, and after for Sir Henry his Brother for Life, the Remainder to his first, second, and third Sons successively, and the Heirs Males of their Bodies, and to the Defendant Richard Cousin for Life, the Remainder to his Sons and their Heirs Males, &c. Item, I appoint, devise, and give to Henry Power to limit and appoint Fleet Damarel, &c. to my Wife after the Death of Amy, (who revera had a former Jointure therein, and died before the Plaintiff's Marriage, but nothing was said of that

Power not executed.
Ante 28.
Post 30.
&c. ibid.
Vide post 87.
1 Vern. 29, 40.

Jointure.
Ante 28.

that at the Hearing) Sir Henry after the Death of Samuel agreed prout, but died within three Quarters of a Year.

The first Question was, If the Plaintiff could be relieved out of the Power, for else there was not sufficient for 300 l. per Annum.

The Lord Chancellor inclined strongly for the Plaintiff, in Regard of the Consideration, and because Henry had Power by the Will to have done it, and was express, that if he had de facto done it, and mist in Time or other Circumstances to have done it well, the Defect should have been supplied; for Circumstances in such Case are only put into such Powers, to the End that no Fraud or Fallhood should be imposed, and cited the Countess of Oxford's Case, so decreed by the Lord Elsmere, and another Case; and said, that the Stat. de Donis was an ambiguous Act; and at the Bar it was observed, that the Will gave no Estate to Henry, nor Estate Tail to his Sons, but the Estate was in the Trustees, and a Trust for Henry, which is under the Power of this Court; and Trusts in Tail are not favoured in this Court. And it was also said, that the Non-performance by Henry ought to be excused, and not imputed to the Plaintiff's Prejudice; for the Death of Henry happening so soon after the Marriage, that Accident being the Act of God, prevented him, and Accidents are a proper Object of Relief.

Stat. de Donis, an ambiguous Act.

Power.

Accidents, Q.

But after some Debate, Churchill for the Defendant moved, that if the Plaintiff have Right, yet she hath no Bill for it on this Case, for she hath set forth a Seisin in Fee, and not the Power; and of that Opinion the Lord Chancellor was. And thereupon the Plaintiff's Counsel prayed, that they might amend the Bill, which was granted, paying the Costs of the Day.

Equity, but no Bill.

Powers how to be executed, and where a defective Execution thereof shall be made good in Equity, or not, see 1 Chan. C. 10, 17, 104, 160, 263, &c. 1 Chan. R. 185. 3 Chan. C. 89, 109, &c. 2 Ventr. 350. Ante 28.

DE
Term. Sanct. Trin.
Anno Regis 32 Car. II.
IN
CANCELLARIA.

Perne *contra* Oldfield.

Curate Eccleſiaſtical. Ante 19.

THE Church of Crowland in the County of Lincoln, being appropriate to the Abbey of Crowland, and no Vicar endowed, (for ought appears it ſeems, that the Cure was ſerved by ſome of the Monks:) The Rectory came to the Crown, and by mean Conveyances to one Mr. Chapman, who gave the Rectory by his Will to the Maintenance of a Miniſter there, for ever, reſerving not the Nomination of a Miniſter there, nor expreſſing any Thing concerning ſuch Nomination, the Deviſe of the Rectory being void at Common Law, being made to no certain Perſon. The Eſtate thereof came to Sir Thomas Orsby and Wingfield, who did appoint and nominate the Defendant Oldfield to be Miniſter and ſerve the Cure; afterwards the Plaintiff, ſuppoſing a Laps to the Crown, was preſented, inſtituted and inducted, as if the Church had been void. Orsby and Wingfield Rectors, ſuppoſing that the Nomination of the Miniſter, belonged to them, nominated Oldfield: Perne ſued the Rectors for Tithes of Fen-lands improved lately, and gained from the Water. They pretend a non decimando, under the Abbey: And that Perne, the other Defendant, was not Miniſter; ſo he pretended that the Tithes belonged to him.

Tithes of Fen-land improved.

For

For the Plaintiff it was said, that here is a pious Use wholly subject to this Court; and that Perne coming by the Ordinary, though he was not Parson or Vicar, was allowed by the Bishop, and decreed accordingly, that he should have the Tithes; but as to the non decimando, a Trial, &c.

Williams *contra* Day. 18 June 1680.

Executrix.
Vide ante 17, 27.
1 Chan. C. 255.

THE Plaintiff Rebecca complains, &c. The Case on the Bill was, That the Defendant, Executrix of her Husband, sued her as Executrix of Roger Win, with Robert Son of Roger, and Co-Executrix with her, for a Debt of 400 l. Principal, due by Bond: That Roger a Mercer dying, the Plaintiff was sick, and unable to manage the Estate. Whereupon Robert entred into the Shop, paid Book-debts, (for Advantage of the Trade, which he continued, whereby the Estate was wasted as to Creditors by Bond;) and there being Leases for Years of good Value, and great Debts by Bond, the Plaintiff and Robert agreed, that those Leases should be sold, and the Money paid to Robert, and he to pay the Money to Creditors by Bond. The Plaintiff joined with him in the Sale, and he received the Money, paid it to Creditors by Bond, and complains, that in a Trial against her in Debt, brought on the Bond, whereto she pleaded plene Administravit, the Payments of the Bond made by Robert in Discharge of her, was not allowed by Sir William Scroggs, Chief Justice, unless that she would stand in Robert's Place, and be chargeable as he was, and by Consequence with the Devastavit committed by him, whereto she ought not to be liable. The Trial proceeded not to a Verdict, but a Juror withdrawn, and now she prays Relief.

Account binds one not Party to it.
1 Chan. C. 55, 262.
Mortgage.

Land is mortgaged to A. then to B. then to C. If A. sued to redeem, and try his Debt by Decree, C. A. and B. shall be bound by the Account which A. made in his Suit, and pay or contribute to the Charges of Suit; if made without Fraud or Collusion. Vide ante.

Waste.
Post 217.

The Lord Chancellor declared, that he would stop Pulling down Houses, or Defacing a Seat by Tenant after Possibility of Issue extinct, or by Tenant for Life, who was dispunishable of Waste by express Grant, or by Trust.

Jason *contra* Eyres, *Domin.*, &c. & Eyres *contra* Jason. } 14 June 1680.

Mortgage decreed, notwithstanding particular Agreement econtra. Vide ante 8, 17, 27. 1 Chan. C. 1, 2, 285. &c.

SIR John Hanmer seised in Fee of the Mano⁊ of Great Hinton, &c. mo⁊tgages the same to Sir Tho. Skipwith fo⁊ 7000 l. and fo⁊feited it; the same was afterwards conveyed to Anne Fisher and her Heirs, on Agreement, that if Sir John Hanmer o⁊ his Heirs paid 4000 l. with Interest, the Lands should be reconveyed, otherwise to be absolute.

The Money was not paid, then Sir John Hanmer and Anne Fisher agree with Sir Robert Jason, Father of the Defendant Jason, fo⁊ the Sale of the Premisses fo⁊ 11500 l. 7000 l. was paid, and the Lands conveyed to Sir Robert Jason the Father, and his Heirs, the 4000 l. and Interest was still chargeable on the Land: Afterward there was a Treaty of Marriage to be had between Sir Robert Jason and the Complainant Dame Anne, and by Articles 1674. it was agreed, That 2100 l. should be paid to Mr. Fisher towards that Debt, 1500 l. whereof being the Portion of Dame Anne, was paid, and 600 l. mo⁊e by Sir Robert Jason; by which the Debt was reduced to 1900 l. Principal Money, fo⁊ securing whereof a Lease fo⁊ 500 Years was made of the Premisses to Travers and Finch Defendants, &c. And is provided fo⁊ Payment of the said 1900 l. with Interest, viz. 57 l. on the 25th of December, 1674. and the 25th of June, 1675. other 57 l. and 1957 l. on the 25th of December 1675. And that afterwards the said Fisher should join with Sir Robert to convey the Premisses to Carew and Holbech, and their Heirs, to the Use of Sir Robert fo⁊ Life, the Remainder to Dame Anne, fo⁊ her Jointure, and in full of Dower. The Remainder to the Defendants, Carew and Holbech, and their Heirs in Trust; that if Sir Robert the Father should pay the said 1900 l. with Interest as afo⁊esaid, amounting to 2700 l. if he should so long live: O⁊ otherwise, If he should within three Years after the Date of the last Conveyance, bearing Date the 19th of June, 26 Car. II. if he should so long live, pay the said Debt on the said Lease, and p⁊ocure the same to be surrend⁊ed; To the Intent that if the Complainant Dame Anne survived him, she so long as she lived, might hold the Premisses discharged of the same; then the said Carew and Holbech should be seised of the Premisses to the Use of Sir Robert and his Heirs.

But in Case Failure of Payment was made, or that Sir Robert, her intended Husband, should die before Payment and Surrender of the said Lease; in either of the said Cases, the said John Carew and Holbech, and the Heirs of the said Survivor, should stand seised of the Reversion to them limited, in Trust for the said Complainant and her Heirs, not only to enable her to pay the said Debt, and free her Jointure thereof; but to the End she might enjoy the Inheritance for Increase of her Fortune, according to Agreement between her and the said Sir Robert; and that then they should convey the same as she, (during Coverture or sole) or her Heirs should direct.

28 March 74. Sir Robert Jason died; Jason the Defendant being his Heir, Anne his Relict after married Sir Christopher Eyres the Plaintiff; and there being a former Incumbrance not taken Notice of to Mr. Hodges, of 1000 l. Sir Christopher Eyres paid that 1000 l. with Damages.

On this Case, cross Bills are exhibited by Sir Christopher and his Wife, to have the Inheritance; and by Jason to have the Inheritance, he paying the Debt.

1st. At the Hearing on Eyres his Part, it was pressed as the express Agreement, that the Wife should have the Inheritance, the Debt being not paid, nor Lease surrendered.

2dly. That it could not be a Mortgage as to Anne the Wife, though the Lease was a Mortgage to Fisher.

3dly. If it had been meant to have been a Mortgage, the Power of Redemption would have been limited to the Heir, as well as to Sir Robert the Father, which was only limited to the Father, and not to his Heir.

4thly. There was Reason for so doing, because the whole Portion was expended in Reducing the Debt, and so till Payment of the Debt, she would be without any Profits of her Jointure.

5thly. The Cause being foreseen, it was expressly agreed, that the Reversion in the Trustees settled, should go to the Complainant and her Heirs, not only to enable her to pay the Debt and free her Jointure, but to the End she might enjoy the Inheritance for the Increase of her Jointure.

1. But the Lord Chancellor decreed it a Mortgage, saying, That if the Father Sir Robert Jason, had lived after three Years, it could not be denied, but he might have redeemed it.

2. That no Mortgage by any artificial Words can be altered, unless by subsequent Agreement.
3. That divers Proofs touching parol Declarations were offered and read on both Sides, of which the Court would take no Notice, but rejected.

See for this 1 Chan. C. 1, 2, 42. 2 Chan. R. 78. Post 136 & 143.

Anonymus. 8 July 1680.

The Case.

A. took a Statute for Payment of 200 l. lent, but finding a former Incumbrance for other 200 l. to B. did purchase B.'s Estate; then discovering another Mortgage made by Dicklemere to C. for 500 l. purchased in that also: But Dicklemere who made all these Incumbrances, did make another to the Plaintiff subsequent in Time to the first Mortgage for l. but precedent to the two last, and this Mortgage. The Bill is, that he may pay off the 500 l. Mortgage, so to be let in, &c.

The Question was, whether he should be admitted without Payment of all, viz. the two later? And decreed he should not unless the first 200 l. Man had Notice, &c.

Pay all or none. Post 87 & 93, 213. Vide ante 20, &c. ibid.

Eodem die Linch *contra* Cappy.

Cappy, Executor in Trust for Linch in Remainder after the Testator's Children, or other nearer Kindred to the Testator than Linch was, of the Residuum of the Testator's Estate, and after for Linch in Case they died as they did. Linch now sues Cappy for an Account: The Question was, whether Cappy, who did receive great Sums of Money of the Testator's Estate, and put out the Money again at Interest, and received Interest for the same, should answer the Interest so made and received by him? And on much Debate it was decreed he should not.

But then it was insisted on, and it was true, that Cappy had annexed to his Answer an Account of all his Doings, wherein he brought to Account the Interest as well as the Principal, and therefore had adjudged the Cake against himself. The Counsel *e contra* answered, he could do no other; for the Bill requires his Answer to the whole Transactions.

Lord North in his Time declared e contra hic.

Interest. Ante 21. Post 150, 153, 235. Executor.

The Lord Chancellor. Did he offer to pay the Interest as well as confess the Receipt of it? No; and therefore pronounced for the Defendant as before: But some Proposition of an Expedient was then offered and accepted.

Anonymus. 13 July 1680.

Freight.
1 Vern. 297.
Q. 6 Mod. 162.
1 Chan. C. 25, 76.
Post 198, 238.

Refusal.

Merchant.

Admiralty.

A Part-Owner of a Ship sued the other Owners for his Share of the Freight of the Ship which had finished a Voyage; but the other Owners did set her out, and the Plaintiff would not join with the Rest on setting her out, or in the Charge thereof; whereupon the other Owners complained thereupon in the Admiralty, and by Order there, the other Owners gave Security, that if the Ship perished in the Voyage, to make good to the Plaintiff his Share; and if she returned, to restore his Share, or to that Effect: And in such Case by the Law Marine, and Course of the Admiralty, the Plaintiff was to have no Share of the Freight. It was referred to Sir Lionel Jenkins to certify the Course of the Admiralty, who certified accordingly; And that it was so in all Places, and otherwise there could be no Navigation: Whereupon now the 13th of July the Plaintiff was dismist.

Fashion *contra* Atwood. 19 July 1680.

Factor.
Agreement.
Assignment.
Executor.
Ante 6, 7, 11, 12, &c.
Post 95, &c.

PEarson living in London, was Agent and Factor for Atwood now deceased, to sell Norwich Stuffs in London, which Atwood sent him from Norwich: And in the Management of this Trade, Atwood charged Pearson with Bills of Exchange; and it so fell out that Pearson had sold in Atwood's Name divers Cloathes for Money payable at future Days; and doubting he had not Goods in his Hands to make good what he had undertaken by Accepting Atwood's Bills, informs Atwood of it, and Atwood agrees, that Pearson secure himself out of what Effects, &c. he had. At this Time Atwood was indebted to Eborne and others by Bond; and Pearson was likewise indebted to others on his own Account: Pearson by Deed assigns to his Creditors the Debts which were due to Atwood; Atwood and Pearson both die; The Administrator of Pearson, and the Assignees of the Debts due to Atwood, but

assigned by Pearson to his Creditors, sue the Executrix of Atwood for to have the Benefit of the Debts due to Atwood for his Goods sold by Pearson, but assigned by Pearson to his own Creditors.

The Question was, whether the Assignee of the Debts by Parol made by Pearson, and the Parol Agreement of Atwood, that the Goods and Debts which Pearson had, and contracted for, should be his Security for his Undertaking for Atwood, should prevail against the Creditors of Atwood, especially such Creditors of Atwood as had Bonds; for the Persons who had bought Atwood's Goods of Pearson did know that the Goods were Atwood's, and not Pearson's, and entred in Pearson's Books as Debts due to Atwood, not to Pearson; and thereupon we of Counsel with the Executor of Atwood, and the Creditors of Atwood by Bond insisted:

1st. That the Goods were sold as Atwood's Goods, and the Buyers entred in Pearson's Books as a Debt to Atwood, Pearson had no Remedy on the Contract; but Atwood was solely Owner of the Debt.

2dly. That the Debt being a Thing in Action, is not transferable by Law; so as notwithstanding the Agreement of Atwood, he still in Law remained Creditor; and this is a Case between Actors and Transactors in England, not of Merchants, who by Law-Merchant may assign Debts.

3dly. That though in Equity Pearson might retain, or be intitled in Equity to the Debt against Atwood himself, yet now the Case is changed by the Death of Atwood, for now the Creditors of Atwood by Bond are in a better Case than Pearson, who had no Title but by Parol; and if Pearson would sue the Executrix of Atwood, she could not pay him; but if she did, she should commit a Devastavit, and break her Oath as Executrix; and the Assignees of Pearson could be in no better Case, than Pearson and his Executors were. Devastavit.

4thly. The Creditors of Atwood by Bond had a good Title in Law to be satisfied out of his Estate and Debts, and they had done nothing to prejudice their Title: And the Case is not the same, for the Goods remaining unsold as for Debts.

The

The Lord Chancellor. By the Agreement Pearson had a good Title in Equity to the Debts, which in Equity are became his, and are no longer Atwood's; and therefore decreed for the Creditors of Pearson.

Account.

Methinks there was another Equity for Pearson, but was not mentioned or insisted on, viz. That in Case of Merchant and Factor, the Merchant should not have Account from the Factor, but if the Factor were out more than could be demanded from his Factor, (as in this Case it happened) the Merchant should first make even.

Anonymus. 20 July 1680.

Joint-Traders.

TWO Drapers entred into Articles of Copartnership, each brought in 1000 l. Stock, there was no Benefit of Survivorship, neither to become indebted without the other, neither to take out of the Stock without the other: One became indebted 100 l. without Consent of his Partner, made his Wife Executrix and died; his Wife confest Judgment for the Debt, the other sues for Account and Relief against the Creditor and the Wife; they confess the Articles, and obtaining the Judgment.

Account.

And 20 July 1680. on Debate, The Lord Chancellor granted an Injunction against the Judgment, because the Debt related not to the Parnership, saying if this shall be suffered no Trade could be in such Case. Mr. Sollicitor cited Atwood's Case, prox' ante 36.

Eodem die.

Sollicitor received the Plaintiff's Money without his Knowledge. Vide 1 Chan. C. 71, 86, 87.

The Plaintiff having a Decree for Money, the Plaintiff's Sollicitor without Order from the Plaintiff received the Money; the Plaintiff knowing nothing of it prosecuted again. On Complaint the Sollicitor was ordered to pay back the Money, with Interest, Costs and Charges.

But as to the Plaintiff, the Lord Chancellor allowed the Payment good, and bid the Plaintiff, if he would, take his Remedy against his Sollicitor.

Anonymus. 12 January 1680.

THE Wife Executrix to her Husband, married a second Husband. A Bill is exhibited against them to discover the Trust; the Husband and Wife disagreed in the Matter, and put in severally their Answers; the Husband denied the Trust, but the Wife confest it. The Cause proceeded to Hearing, and the Plaintiff proved the Trust only by one Witness, which the Plaintiff insisted on with the Wife's Confession, to be sufficient; the Matter being but in that, wherein she was concerned as Executrix. But the Bill was dismist, quia the Wife's Answer shall not bind the Husband, ex relatione Sir J. Churchill and Serjeant Rawlinson.

The Wife's Answer not prejudice the Husband.
Testis singularis.
Post 101, 173.

For according to the Case of Paget and Paget, post 173. The Wife's Answer alone without the Husband, is no Answer.

But where the Husband puts in a Plea, in the Name of him and his Wife, and he swears it, though the Wife refuses to be sworn; yet the Plea shall stand as to the Husband. See 1 Chan. C. 296.

Term. Sanct. Hill.

Anno Regis 32 & 33 Car. II.

IN CANCELLARIA.

Balch *contra* Tucker. 24 January 1680.

Trial directed on a Point not in Issue.
Ante 3.
Post 196.

AN Agreement was made under Hand and Seal, that Balch was to pay A. S. her Debts being 300 l. and she was to dispose by her Will any Sum of Money not exceeding 200 l. and A. S. being seised of an Estate for Lives, to her and her Heirs, of the Rectory of Huish; it was agreed, That if she had a Child, the Child should have the Rectory after her Death; but if the Child died, the Plaintiff Balch was to have the Estate. This Agreement was made in Order to a Marriage between the Plaintiff and A. S. The Marriage took Effect, the Child died, A. S. made her Will, and thereby gave 150 l. in Money Legacy, and died. The Defendant her Heir brought an Ejectment for the Rectory, and recovered it by Verdict, as he must do, there being no Estate yet passed. Balch exhibits his Bill, sets forth the Agreement, and prays Execution, paying the Legacy and the Debts. The Defendant by Answer positively denies the Agreement: The Cause went to Proof and Hearing; the Plaintiff proves the Agreement fully; the Defendant examined one Witness, to prove that the Morning before the Marriage, A. S. was troubled and wept, and declared to him, that the Reason of it was, that she would not marry unless a Writing, which she had made to her Husband, might

be delivered to her again. Whereupon a Writing was delivered to him, and he delivered it to A. S. the Husband, saying, she should have any Thing so she would marry him. The Marriage proceeded, the Cause coming to be heard, the Court ordered a Trial upon this Point only, viz. Whether the Agreement were waved. A Trial was had, and found for the Defendant that the Agreement was waved. The Plaintiff moved for a new Trial, and was denied, and an Order to dismiss the Bill, and now the Plaintiff moved again for a new Trial, or that the Cause might be re-heard. I offered it to the Court, that the Direction for a Trial at first, was hard upon us.

The Question only upon Bill and Answer was, Agreement, or not: Nothing in Issue, whether the Agreement was discharged, for that was quite contrary to the Issue; and if the Witness swore ever so false, he is not perjured, and it is impossible for the Plaintiff to disprove the Allegation of a Defendant, which the Defendant never alledged: and it seems a Piece of Artifice to make that a Defence of which the Court can never give Judgment, (when a Thing is not alledged:) The Court must judge secundum Allegata & probata; but by this Way the Force of all Evidence proper for the Court, shall be judged by the Jury, and not by the Court; for in this particular Case, if the Deed it self hap been delivered up, yet it is no Discharge in Law, except it had been cancelled: If it be granted that the very Deed was that which she desired, which yet he did not prove, for he, viz. the Witness, swears he cannot write nor read, nor tell what it was that was delivered; yet it can amount to no more than that she desired to have it in her Power to destroy it, which she never did; for it is proved the Husband had it after her Death: And if the Defendant be too hard for us in the Form of Proceeding, coming so late, we have more of the Strength of the Cause on our Part in Point of Substance.

The Court said we came too late, and would do nothing in the Motion.

Note; The Court directed this Trial not upon a Deed shown, but upon Matter of Fact.

Juxon *contra* Morris. 8 February 1680.

Post 48. Surrogate Deputy within the Stat. E. 6.

AN Officer within the Statute of 5 Edw. 6. (as I take it a Surrogate) makes a Deputation of his Office, rendring thereout 90 l. per Annum, and exhibits a Bill to have an Account.

The Defendant pleads, that the Deputation is void by the Statute, and ought to have no Account, it being in Effect a Farm within the Statute.

Vide Lockner & Strode. Post 48.

Curia. After long Debate the Plea was allowed.

Comes Banbury *contra* Briscoe. *Eodem die.*

Deed brought into Court for Use of each Party. See 1 Chan. C. 11, 231. & ibid. 48, 69, 292. 1 Vern. 480. M. 32.

A Great Settlement was made of the Estate of the Earldom, consisting of divers Manors. Parcel of the Land on good Consideration was settled, under which Briscoe claims, being a Security for 6000 l. and the Deed of the grand Settlement delivered to Briscoe, or those under whom he claims: The Rest of the Manors, &c. came to the Plaintiff, who exhibited his Bill to have the Deed of Settlement, offering in his Bill that Briscoe shall have a Copy attested by the Court.

Briscoe pleads his Settlement, and that he cannot make any Title without the grand Settlement, and therefore keeps it; but offers to the Plaintiff, that he may have a Copy of it attested, and that he will produce the Deed on all Occasions at the Plaintiff's Cost.

Upon hearing the Plea, the Lord Chancellor said, If Tenant for Life have a Deed, whereby the Reversion and Inheritance is in another, he may at Law detain the Deed against the Reversioner; and ordered, that the Settlement shall be brought into Court for it's safest Custody, and both Parties have the Use of it as they have Occasion: And both Parties if they please shall have Copies attested.

Knight *contra* Cooke. *Eodem die.*

J. S. seised of the Reversion after an Estate for Life, of divers Copyhold Lands, and two Acres of Freehold Lands, which Freehold Lands were in the Possession of Ralph and the Rest in A. B. C.

J. S. assigns to J. D. and surrenders the Copyhold, and J. D. assigns the two Acres of Freehold to the Plaintiff, and inter alia, the Copyhold in the Tenure of James These Assignments were on valuable Consideration; the Bill charges that this was a Mistake, James being named for Ralph; and that the true Intention of the Parties that made the Assignments was, that the Copyhold in Ralph's Tenure was to be assigned, and that James had no Copyhold there, and therefore must needs be intended that Ralph had; because James had none, James and Ralph having both the same Sirnames.

It was alledged, that the Assignment and Possession had been twenty Years; but after it appeared that it was but four Years, since the Tenant for Life died.

The Lord Chancellor inclined at first against the Plaintiff, but at last declared, that the Copyhold could not pass but by Surrender only, and not by Conveyance.

Mistake in a Conveyance.
See 1 Chan. C. 39, 70, 85.
Copyhold.
2 Chan. R. 216.
Max. 55.
Post 225.

Colston *contra* Gardner. *Eodem die.*

The Case was.

THE Plaintiff exhibited a Bill for an Account of a Personal Estate, and an Account was decreed, and referred to a Master to take the Account: Exceptions were taken to the Account, and referred back on one Exception. In the Interim the Defendant having had a Treaty for the Marriage of his Son, but nothing concluded; he did by Deed, in Consideration to enable his Son to make a Jointure in Case he married, and in Consideration that his Son had undertaken to pay his Debts, amounting to 1700 l. settle all his Lands upon his Son and his Heirs, the Lands being of far greater Value, viz. many 1000 l. and the Creditors were no Parties to the Deed, and in the Deed a Power of Revocation reserved to the Father in

Account of a personal Estate decreed and referred to a Master.
Q. Ante 7, 32, 38.
Post 157, 158.

Case the Son should die without Issue. This was done before the Master made his second Report: And the second Report varied but 11 l. from the former, being about 400 l. due upon both Reports: Process of the Court was pursued to a Sequestration against the Father and his Assigns, the Son being taken up on Attachment for disobeying the Sequestration; but being examined, excused himself by the Title aforesaid.

Sequestration.

Post 45, 46, 163. 1 Chan. C. 92.

The Question was, whether the Son was liable to the Sequestration in this Case? Which was much debated by Counsel on the Son's Behalf.

1st. Because there was no Land demanded by the Bill, only an Account of a personal Estate.

2dly. Because at the Time of the Alienation, the Account was not ascertained or adjudged, and the Case of an Outlawry was just; the Party aliening after the Outlawry, his Lands were not subject to it in the Hands of the Alienee. And

Outlawry.

1 Chan. C. 3, 258.

3dly. The Sequestration was for the Contempt, not for the Duty.

The Lord Chancellor took Time to advise on the Case, and now, 8 February 1680. delivered his Judgment, and said, he would explain himself for Learning and Use.

He observed that the Judges at the Common Law were severe, and unwilling to support or assist the Proceedings of Chancery: And therefore he would cite some Cases and Proceedings against the Proceedings in Chancery first, and then apply them to the Case in Question.

Object. 1. That this Deed or Settlement was made between Father and Son only, and the Friends of the Son's Wife, nor Wife, no Party to it: And all the Estate the Father had in the World was conveyed to, and settled upon the Son in Consideration of this Marriage to be, and 1700 l. to pay his Debts.

2. That a Sequestration does not bind till laid upon it, or at least not till ordered.

At Common Law a Man may convey away his Estate before Outlawry.

And then the Lord Chancellor cited these Cases at the Common Law, as follow:

Rules of Sequestrations. Vide Curs. Canc.
1 Vern. 58.
Post 163.
1 Chan. C. 92, 221; 241.

41 Jac. Cro. fol. 651. Brotlige contra Sequestration.

5 Car. 1. Heber's Case. Trover gist.

20 Jac. Elwes. Indictment for Murder for a Laying on a Sequestration, one being killed: Question if justifiable or not, Pardon sued out.

These Resolutions were so bold and desperate, that it was (Injustice) to maintain them where Conscience and common Honesty was concerned to preserve People and their Estates from Tricks and Cheats; and no Remedy for any Person in these Cases following, if those Resolutions were maintainable; but they since have been changed.

3 Car. 1. Roll's Abridgment 376. Bond lost not recoverable.

22 Edw. 4. fol. 6. A Release obtained from Trustee, no Relief, for Cestui que trust.

13 Jac. Finn and Powell.

11 Edw. 4. Resolved that Money on a Bond, and the Bond lost, and after sued for, yet no Remedy, but the Money must be paid again.

13 Jac. Powell contra Harris; Null Account contra Executor.

Eodem anno. Glasscock Entry lawful for Condition broken, not to be relieved.

14 Jac. Bromadge contra Election to pay Damages for executing a Bargain in Specie.

Trin. 17 Car. Either cited in the C. B. or in the Star-Chamber, moved by Serjeant Bacon for a Prohibition sur Sequestration: The Judges found on Debate, that the Land was not within the Sequestration, for which the Prohibition was prayed; but if the Lands, for which the Prohibition was prayed, had been subject and within that Sequestration, it was granted the Sequestration had been lawful.

Court-Baron, A Levari fac' may be renewed from Time to Time; and in Chancery, may be in like Manner as at Common Law.

And

And may ſequeſter Land and Copyhold too, and may be extended to a Perſonalty, for a Sequeſtration to be laid on and adminiſtred by Court of Equity, never to be laid on but conſcionably.

Sequeſtration to come bona fide, without Conſideration, yet good.

Derby Com. contra Com. Ancram. Sequeſtration goes not till Suit revived againſt the Heir, unleſs the Father's Conveyance be pleaded.

Witham and Bland. A voluntary Conveyance to the Heir, to avoid an approaching Sequeſtration againſt the Heir, good, if bona fide done: But in this Caſe where Fraud appears, Authority and Reaſon againſt it.

Reaſon 1. Not to allow it in Caſe of a juſt Duty decreed.

Makes this Court Illuſory.

Permits Mankind to be Cozened.

And two are ſettled already; Witham and Bland's, which began in the Time of my Lord Shaftsbury, and was where the Son claims againſt the Father, &c. which came to be heard the 4th of March 1672. And was in November following before his Lordſhip, the now Lord Chancellor, a Sequeſtration was ordered to iſſue.

The Son departed from his voluntary Conveyance, and ſet up a prior Conveyance, with Power of Revocation; but the Deed being without a Power of Limitation to limit new Uſes, which his Lordſhip then and now declared, that although no Power of new Limitation was expreſſed in the Deed, yet the Law gives the Revoker a Power, for he that has Power to revoke has Power to limit.

17 May, 29 Car. 2. Langley and Breydon. A Sequeſtration for Perſonal Duty, and then declared a voluntary Conveyance on Purpoſe to bar Sequeſtration, void.

And here in this Caſe, the Wife ſhall have that Part of the Eſtate ſettled on her for Jointure.

Objected by Sir Fran. Winnington; Your Lordſhip declared a voluntary Conveyance would not bar a Sequeſtration, therefore permit us to try it.

Curia. No; I am of Opinion there is Fraud apparent, and needs no Trial for Satisfaction.

Snelling *contra* Squib. *Eodem die.*

SNelling had Judgment against Sidenham of 1200 l. for Payment of 500 l. Squib purchased of Sidenham for valuable Consideration without Notice: Snelling sues Squib to discover Lands subject, &c. that he might extend, not knowing the Place nor who Tenants. Squib pleaded his Purchase for valuable Consideration without Notice.

The Lord Chancellor allowed the Plea, for such Purchase shall not be hurt in Chancery against the Plea; and therefore Squib shall not be enforced to discover what Lands are liable.

1. It was much debated, and objected, That a Judgment binds the Land, who ever had it: And the Plaintiff's Bill is not to have a Decree for his Debt, or to have the Land, but to discover the same whereupon Law he may recover his Debt.

2. His Title is given him by Act of Parliament, by which the Land is subject, and was not at Common Law.

3. The Consequence of this will make all Statutes and Judgments, which are a Security by Law, to become of no Effect, for the Conuzee must extend the Whole, or a Moiety of the Whole: And if he omit any Part, his Extent is avoidable, and by Consequence, he that acknowledges a Statute or Judgment, and after aliens any Part for valuable Consideration secretly, it will be in his Power to avoid his own Securities.

4. There will be no Difference between a Judgment obtained by Consent, and a Judgment in Invitum, or Process of Law; in which Case it will be very hard for any Person, that any Man by his own Act should avoid the Justice of the Law, whether he carry it secretly or openly, or to enable any other Man to do it, by secret or other Means.

5. Where Men contract, the Purchasor may provide for himself by Covenant; but he that recovers by Law, cannot provide for himself by Covenant; so that the Case is more strong in Case of a Judgment, than in Case of a Mortgage, or other Estate by Conveyance.

Notice.
Vide ante 6, 20.
Post 122, 126, 161, 246, &c. ibid.
1 Chan. C. 34, 38, &c.

Purchaser of Lands subject to Judgment not enforced to discover, otherwise if to Decree.
1 Chan. C. 34, 38, 143, 232.

6. A Purchaſor from J. S. who has a Decree againſt him in Chancery for Land, ſhall be bound by the Decree though he had never Notice of it; and yet the Decree in Chancery binds the Perſon and not the Land, and the Judgment may bind the Perſon of the Land: And it is hard that the Chancery, whoſe Power is only upon the Perſon, ſhall eretute their own Decree againſt a Purchaſor and not againſt the Execution of a Judgment at Law: Whereas a Purchaſor after a Judgment in Ejectione firmæ is not bound: A Purchaſor after a Decree, in Point of Conſcience; for ſuch Purchaſor ſhall not be enforced to diſcover what Eſtate he hath: But the laſt Objection at the Hearing was not made.

Notice.
Vide ante 6, 20.
Poſt 122, 126, 161, 246, &c. ibid.
1 Chan. C. 34, 38, &c.

Purchaſer of Lands ſubject to Judgment not enforced to diſcover, otherwiſe if to Decree.
1 Chan. C. 34, 38, 142, 232.

Lockner *contra* Strode. 9 Febr. 1680. Ante.

Vide Juxon and Morris, fol. 42.

Under-Sheriff's Bond.

BOND entred into by the Plaintiff of 400 l. to the Defendant, when high Sheriff of the County of Somerſet: The Bond was without Condition, but intentionally for Performance of Covenants, to ſave the high Sheriff harmleſs from Eſtrapes, and to pay the high Sheriff out of the Profits of the Office 400 l.

Jones, Attorney General, Inſiſted for the Plaintiff, that the Bond and Contract for ſelling and farming the Office, was void by the Statute.

Serjeant Maynard Inſiſted for the Defendant, That it was the Plaintiff's own Agreement to pay it out of the Profits, and the Under-Sheriff was but his Subſtitute; for if the Profits did not extend to 400 l. then he was not to pay ſo much, but to be accountable: And if they amounted to more, the Defendant had no Power to call him to account for any more than the 400 l. only.

Beſides, the Statute was not Penal, nor inflicted any Forfeiture or other Puniſhment on the Sheriff, if he had farmed the Office.

Curia. My Lord was of Opinion ſeemingly, That the 400 l. ought to be paid, but referred it to a Trial at Law in Dorſetſhire, what was the Agreement, whether he was to have 400 l. or no.

Tiffin *contra* Tiffin. 11 Feb. 1680. Vide poſt 55. 1 Vern. 1. S. C.

LAND in Queſtion was mortgaged for Years, and purchaſed by A. B. from the Mortgagor, the Conveyance was of the Fee-ſimple to A. B. and the Mortgage-Leaſe to Friends in Truſt for A. B.

Leſſee for Years, Owner of the Inheritance in Truſt for him and his Heirs, deviſeth the Lands, but the Will not ſigned by him, the Heir hath a Decree for the Term.
1 Vern. 1, 133, 403, 435, 436.
1 Chan. C. 98.
2 Ventr. 359.
1 Salk. 154.
2 Chan. R. 377.

Then A. B. makes his Will after the Month of June 1677. The Will was atteſted by three Witneſſes according to the Statute, but he died before it was ſigned by himſelf; the Deviſe was to his Wife and made her Executrix, and left her Aſſets enough to pay his Debts, as was alledged by the Plaintiff, but denied by the Wife's Counſel, but no Proof as to that was read on either Side.

The Bill was by the Heir againſt the Truſtees and Wife, to have the Term aſſured with the Inheritance, becauſe by the Original Purchaſe the Term was to wait on the Inheritance in Equity, which Inheritance did not paſs by the Will, (econtra) objected, tho' in Caſe of Land the Teſtator may ſign the Will, elſe void. Yet in Caſe of Perſonal Eſtate, a Nuncupative Will is good, and no Subſcription is required by the Statute, and this Will is accordingly proved by the Wife in the Eccleſiaſtical Court, and there may be Debts for ought appears, whereto this Leaſe ſhall be liable; the Plaintiff's Counſel cited the Opinion of Hale Chief Juſtice, who took a Difference between the Caſes; the Teſtator's Original Purchaſe kept the Leaſe ſevered from the Inheritance to preſerve it from Incumbrances, and where himſelf after Purchaſe of the Fee made a long Leaſe to wait on the Inheritance.

Lord Chancellor ſaid, I will neither make a Leaſe for Years that waits upon the Inheritance where it is not Aſſets in Law, to be Aſſets to pay Debts in Equity, and where a long Leaſe ſhould wait upon the Inheritance, the Inheritance being in Truſt in other Men, and the long Leaſe in the Purchaſer, and the Purchaſer dying indebted, ſo that the Term in Law will come to the Executor and be Aſſets to Creditors, there I will not make it no Aſſets in Equity.

Truſt of a Term waiting on the Inheritance when ſhall be Aſſets.
Poſt 55.
Q. Poſt 152.

Mr. Keck offered Reaſons with that Difference.

Churchill, econtra, ſaid it was the ancient Difference of the Court.

Lord Chancellor affirmed the Difference.

Then Keck objected that here was a plain Intention of the Testator, that his Wife should have it, and the Will though not signed is a good Declaration of a Trust of a Term tho' not signed by the Party, because such a Will is good as to a Chattel by the Statute.

Lord Chancellor decreed for the Plaintiff against the Will, and said else the Statute would be of little Effect, for most Estates have Leases, Extents or Judgments waiting on to protect the Inheritance, &c. And if they should be divided from the Inheritance by a Will not signed by the Testator, the Statute would be of little Effect.

In this Case I was not a Counsel, but remembred the Case of Nurs and Yarworth 1674. resolved by his Lordship, which in Reason I thought was contrary to the Reason of this Case; for there a Will which was void as to the Inheritance, yet was made good as to the Lease that waited upon the Inheritance, and the Case there was somewhat stronger, because the Devisee of the Lands was Plaintiff there for the Term against the Trustee of the Term and the Heir, but is here Defendant.

Ellis *contra* Guavas.

Heir of Mortgagee decreed to convey to Administrator of Mortgagor.
Quære ante 1, 4.
1 Chan. C. 283, 286.
1 Vern. 271, 412.
Post 51, 220.
M. 21.
2 Ventr. 348, 351.

WHERE the Heir of a Mortgagee was decreed to convey the Land to an Administrator of a Mortgagor, tho' the Mortgage was forfeited, and the Heir in Possession by Descent, and no Want of Assets, and the Mortgagor did offer to redeem, the Lord Chancellor saying for Reason, that the Mortgage-Money being Part of the Personal Estate, the Land shall go to the Administrator, because the Money would have gone to her. And quære, if in such Case the Mortgagee should have devised the mortgaged Lands by Will in Writing, but not attested according to the Statute, and that Will proved in the Ecclesiastical Court, whether the Devisee or Executor shall have the Land or Money when clearly he meant the Executor should not have it.

DE
Termino Paſchæ,
Anno Regis 33 Car. II.
IN
CANCELLARIA.

Sir John Winne *contra Sir* Thomas Littleton *and his Lady*, William Price, *&c.* 30 April 1681. 1 Vern. 3. S. C.

THE Caſe on hearing was, William Price ſeiſed of Land in the County of Flint, Merioneth and Denbigh, conveyed them to Goulsborough, but defeazanced for Payment of 1600 l. and Intereſt to Goulsborough. Sir Richard Winne was Party to the Defeazance, and covenanted with Goulsborough to pay the Money in Caſe Price failed; and in ſuch Caſe G. was to convey, &c. to Sir Richard Winne, who on Failer of Payment by Price paid the Money, had the Lands conveyed to him, and entred and enjoyed the Lands divers Years.

Mortgage in Fee; Adminiſtrator ſhall have the Money, though the Mortgagor (having other Lands) deviſeth all his Lands to J. S.
Ante 49, 50.
1 Ch. C. 88, 283, 286.
2 Ventr. 348, 351.

Sir Richard Winne being thereof ſo ſeiſed, and ſeiſed alſo of other Lands in other Counties in Wales, whereof Part lay in the County of Merioneth (as Part of the mortgaged Lands did, but of no Lands in Flint and Denbigh, but the mortgaged Lands,) made his laſt Will in Writing, viz. and thereby deviſed to the Plaintiff all his Lands, Tenements and Hereditaments, in the County of Angleſey, Merioneth and Carnarvan, or in any or either of them, or elſewhere within the Dominion of Wales. And after the Bequeſt of ſeveral great Sums and Legacies, did give and bequeath all the Reſt and Reſidue of his Goods, Chattels and Perſonal Eſtate whatſoever, his Debts, Legacies

I deviſe all my perſonal Eſtate.
1 Chan. C. 16.

cies and Funeral Expences, being firſt paid unto his Loving, &c. whom he made ſole Executor of his laſt Will, (leaving a Blank.) The ſaid Richard Winne died, without naming any Executor of his ſaid Will? And the Defendant Dame Anne being his Siſter of the Half Blood by the Mother's Side, and next of Kin, did take Letters of Adminiſtration of his Perſonal Eſtate with his Will annexed.

Teſtator giveth all his perſonal Eſtate to his Executor, but nameth none, it is void. Vide 1 Chan. C. 198, 140.

And herein the ſole Queſtion was, to whom the Mortgage-Money being now come to 3000 l. ſhould be paid upon Redemption; the Plaintiff claimed it, becauſe by the Will, the mortgaged Lands did paſs unto him, and conſequently the Benefit of the Mortgage-Money, the rather for that Richard Winne had entered on the mortgaged Lands, and was in Poſſeſſion at the Time of his Death. And the Deviſe of the Perſonal Eſtate was void, being deviſed to an Executor and none named.

The Adminiſtratrix inſiſted, that now by the Rule and Courſe of the Court, where Lands are mortgaged for Payment of Money, the Money is always accounted Part of the Perſonal Eſtate, and ſhall go to the Executor or Adminiſtrator when ever redeemed, tho' the Mortgage be in Fee-ſimple, as here it was; yea altho' the Money be made payable to the Mortgagee and his Heirs, and that in this Caſe, the Perſonal Eſtate being deviſed to his Executor, is a good Declaration that his Perſonal Eſtate ſhould go to his Executor, tho' the Deviſe for want of naming an Executor is void as a Deviſe, and conſequently the Money belongeth to her as Adminiſtratrix. And it was inforced further, That the Intention of the Teſtator was only to paſs his Paternal Eſtate, becauſe he does not expreſly mention Flint and Denbigh, where the mortgaged Lands lay, ſaving only Merioneth, where Part of the Mortgage lay, but his Paternal Eſtate alſo lay there, and chargeth the Deviſee of his Lands, with a Rent-charge to another Kinſman, which if he ſhould charge the ſame on the Mortgage, would be in Part loſt upon the Redemption of the Mortgage. And Men when they ſpeak of their Lands, uſe not to call their mortgaged Lands their Lands; and when the Teſtator deviſeth by the Words all my Lands, he intended his Paternal Eſtate.

Where Lands are mortgaged for Payment of Money, the Money is Part of the Perſonal Eſtate, and ſhall go to the Executors or Adminiſtrators, and not to the Heir. See 1 Chan. C. 98, and 286, and the Notes there. Ante 29. Poſt 115, 116, 221.

The Court thereupon, and after long Debate, decreed the Mortgage-Money to the Adminiſtratrix.

DE
Term. Sanct. Trin.
Anno Regis 33 Car. II.
IN
CANCELLARIA.

Anonymus. 1681.

THE Father and Son within Age covenant to convey Lands on valuable Consideration, the Son was infra ætatem, but being now come of Age, the Father is decreed to procure his Son to convey.

Covenant at under Age decreed to perform.
Q. 1 Chan. C. 157.

Anonymus. 1681.

QUEEN Elizabeth founded the Hospital of in and appointed five Poor therein, each poor Person to have therein 8 d. per Week, and 8 l. per Annum to the Guardian, and made a Prebend Residentiary of the Cathedral of pro tempore existen' Guardian; the Land so given to the Hospital is now improved to be worth 60 l. per Annum. Now the Suit being in Chancery for the poor Brethren to have Increase of Maintenance; it grew to be a Question, whether the Guardian should not have Increase also: And the Decree was, that all above 8 l. per Annum should be to the Poor only. Some of the Counsel made a Difference between this Case and where the only Imployment was to be a Guardian, for here he is made Guardian who is a Prebend.

Revenue of Hospital improved is for the Poor, not the Guardian who had a certain Stipend.
Q. 1 Chan. C. 214, 215.

Anonymus.

Anonymus. 1681.

Deviſe of Lands to pay Debts.
1 Chan. C. 299, 280, 297.

SIR John Gell and others, who are Creditors of Charles Agard deceaſed, Plaintiffs, againſt John Adderly and others Truſtees of Charles Agard, and againſt Smith Adminiſtrator of Charles Agard, and alſo Creditors of Charles Agard, and other Creditors of Agard, and againſt other Purchaſers of his Lands. The Caſe on hearing was, viz. Charles Agard ſeiſed in Fee of Lands, and indebted to divers Perſons, conveyed his Lands to the Uſe of himſelf for his Life, and after to the Uſe of his Will, and by his Will deviſed the Lands to Adderly, Orme, &c. for Payment of his Debts, and died. The Truſtees being Creditors of Agard, and bound with him as his Sureties, after this Suit ſold the Lands, paid themſelves and other Creditors to whom they ſtood bound, and the Plaintiffs being alſo Creditors unſatisfied, and nothing left to pay them, their Bill was to have proportionable Satisfaction. At Hearing the Lord Chancellor decreed accordingly, and declared,

Truſtees being Creditors pay themſelves firſt.
1 Chan. C. 280, 297.
1 Vern. 482.
All Creditors equally concern'd where Truſt of Conveyance is to pay Debts.
Truſt.
Debt.
1 Chan. C. 22.
Ante 9.
Poſt 132.
No Difference to be made in Payment betwixt Debts by Promiſe and Debts by Specialty, but equal in Proportion.
On Bill of Review, 35 Car. 2. this Decree was revers'd by the Lord Keeper North, in one Point, viz. that thoſe Creditors who had received their Monies, ſhould not refund any Part of that which they had received.

That when a Man ſettles his Lands for Payment of his Debts generally, then all his Creditors are equally concerned and intitled, and none is to be preferred before another, and in this Caſe Debts without Specialty are to be in the ſame Condition, and equally regarded as Debts by Specialty; for though there be a Difference in Caſe of Executors who are to pay Specialties before Promiſes, that is an artificial Preference by Law; but naturally a Debt by Contract without Specialty, is as juſt as the other. And the Conveyance to the Truſtees being themſelves Creditors, and Sureties for a Guard, doth not give them any Preference before others, but they muſt be in the ſame Degree in Point of Payment and Satisfaction as other Creditors were. And though ſome Circumſtances in this Caſe might give Hope or Confidence to the Truſtees that they might prefer themſelves, viz. that Adderly was his Servant, Orme lent his Money at the Time when the Conveyance was made, and ſome Speeches tending to declare ſuch Truſt, yet that alters not the Caſe; beſides ſuch Declaration was ſince the Statute of Frauds and Perjuries.

But as to the Perſonal Eſtate, the Adminiſtrator may according to Law, ſo far as that goeth, prefer himſelf ſo far as the Perſonal Eſtate extends, but no further.

Tiffin *contra* Tiffin. *Vide ante* 49.

1 Vern. 3. S. C.

Statute of Frauds and Perjuries. Will.

Term attending the Inheritance. Ante 49, 50. Poſt 156, 160. 1 Chan. C. 47.

SIR Roger Martin ſeiſed in Fee of Lands in Long-Melford, &c. mortgaged the ſame for Years; Robert Tiffin agreed with Sir Roger Martin for the Purchaſe of the Lands, and paid the Mortgagee, and bought the Inheritance of Sir Roger Martin who conveyed the Inheritance, viz. the Reverſion of the Mortgage to Robert Tiffin, the mortgaged Leaſe for Years was conveyed to Tucke and Groom in Truſt for R. Tiffin; R. Tiffin ſeiſed in Fee of the Reverſion, and intereſted in the Leaſe for Years, ut ſupra, in Truſt to wait on the Inheritance, makes his Will in Writing, and thereby deviſeth the Lands in Queſtion to J. S. for Life, and afterwards in the ſame Will deviſeth the Lands in Queſtion, and all his Lands, Tenements and Hereditaments, (naming none by Name) to his Wife, charged with ſeveral Sums of Money; ſhe after his Death proves the Will, and takes Adminiſtration cum Teſtament' annexo, no Executrix being named in the Will. The Will was made after 1674. to wit in Auguſt 1679. the Plaintiff as Heir to the Deviſor exhibits the Bill againſt the Adminiſtratrix and Deviſee, and againſt the Truſtees of the Leaſe. The Cauſe came to be reheard on Petition of the Wife, (for the Cauſe was decreed againſt her formerly, becauſe the Leaſe was to wait on the Inheritance.) And the Will (as to the Inheritance being made after 1674.) and not ſigned or atteſted prout the Statute, was void. I was not at the firſt Hearing of Counſel, but now with Mr. Solicitor and Mr. Keck, offered to the Conſideration of the Lord Chancellor.

1ſt. That it is true the Will is void and ineffectual, quoad the Inheritance and Freehold.

2dly. But is good and will take Effect as to the Leaſe and the Truſt thereof, altho' that ſuch a Leaſe regularly ſhall wait upon and go along with the Inheritance, but ſuch Attendance of the Leaſe is not by Law, but is a Creature of this Court, but this Court will never make it to go

go with the Inheritance, if Equity be against such Attendance; and therefore if a Man purchase Land, as in this Case, and take a long Lease in his own Name, and the Fee in Friends Names in Trust for him and his Heirs, and dieth indebted without other sufficient Assets to pay the Debt, the Executor shall retain the Lease to pay the Debt, and the Lease shall not wait on the Inheritance contrary to the express Intent and Meaning of the Owner of it, and the Meaning of Parties; and therefore if the Cestuy que trust of a Term that in Equity should wait on the Inheritance, should recite in his Will, that he was Cestuy que trust of it, the Reversion in Fee to himself, and should thereby devise the Term for Payment of his Debts or to younger Child, this would be good in Equity. The Devise to the Wife in this Case is good to her, tho' by general Words, but the general are as strong as if they had particular Names, for he had no other Lands. As a Devise of all Lands will carry a Term for Years in Lands, if there be no other Estate of Lands in the Devisor but for Years. Lord Chancellor decreed for the Heir against the Wife, because else the Statute would be easily avoided, and of small Effect and of dangerous Consequence, for few Men's Estates of Value but have Leases or Incumbrances by Statute or Judgment, &c. waiting or protecting the Inheritance; and if they may be disposed by Will made without those Circumstances which the Statute requireth in Case of Devise of Inheritance, notwithstanding the Statute, the Statute is of little Effect.

A Question was moved that this Will was not according to the Statute: But the Lord Chancellor himself who moved it answered himself, viz. As to that, That it was proper to be objected in the Court Ecclesiastical, and being under Probate it shall be intended good here.

Dashwood *contra* Elwall. 20 June 1681.

Factor takes Security in his own Name, without Notice of it to his Principal.

Merchant.

Factor.

Vide ante & prox. Pag.

D. Employed E. a Citizen of Exeter, to sell for him divers Irish Commodities, which E. received for D. who dwelt in London; E. sold the Goods in Trust, and took Bond for the Money, viz. so much as came to 300 l. and died; the Defendant his Son is sued for an Account; the Question was, whether the Bonds be a good Discharge, for the Obligors were failed since

the Bonds taken, for it was ſaid the Bonds were taken the better to ſecure the Debts, for the Buyers were Tradeſmen as dealt in Wool, and they would be bound to Elwall their Neighbour whom they knew, but not to Daſhwood whom they knew not.

Ante 6, 7, 11, 12, 36, 37. Poſt 95, &c.

Econtra, It was objected, that though a Factor having a general Commiſſion or Authority to ſell or diſpoſe of Goods, may ſell or diſpoſe on Truſt without ſpecial Warrant, Oyer or Reſtraint, and may give Day of Payment, yet he cannot take Security by Bond in his own Name, eſpecially without Authority to do ſo, or at leaſt giving timely Notice to his Principal of it, elſe it will be in the Power of a Factor that deals for ſeveral Merchants, and for himſelf alſo, taking Securities by Bond in his own Name, if any of the Debtors fail to gratify whom he pleaſeth with the good Securities, yea himſelf, and play the Securities good or bad into his own Hand, or into what Hand he pleaſeth, which will put a ſtrange Power in Factors, and be extreamly prejudicial to Trade and Merchants: So in the Caſe of Gibbon and Doyley, where the Teſtator gave Reſiduum Bonorum to be divided among Sixteen of his Kindred by Name, as his Executor ſhould voluntarily without Compulſion of Law declare; the Executor divides to Fifteen, and they were ſatisfied, and was willing to pay the Reſt to the Sixteenth who now ſued for an Account of what the Reſidue was; the Executor pleaded the Matter in Bar of the Account, offering to pay the Sixteenth Man the Plaintiff, ſuch a Sum, which was as he pleaded, the Sum left. But the now Lord Chancellor diſallowed the Plea, becauſe heed was to be taken, that we make not ſuch Examples, under which diſhoneſt Men may ſhelter themſelves. And if this Power ſhould be allowed to Factors, diſhoneſt Factors will have a very ſafe Shelter, and it will be impoſſible to diſcover what Goods he ſells for one, what for himſelf, and what for others. If an Executor hath Orphans or other Mens Money in his hands, and hath Power to lend it, if he do ſo and take Security in his own Name, which faileth, he ſhall anſwer the Debt of his own Money, unleſs that he endorſe the Bond, or do ſome other Thing at the Time of lending the Money or taking the Security, which may doubtleſs declare the Truth, &c. And in the preſent Caſe, the Factor by taking the Bond in his own Name hath diſabled his Merchant ever to recover againſt

Factor that hath a general Commiſſion may ſell on Truſt.

But cannot take Bond in his own Name.

Prejudice Merchants.

Gibbon and Doyley.

the Debtor, who knowing no other but that the Goods sold were Ellwall's, and giving him Bond for it, there now is no Remedy for the Debt at Law but in Ellwall's Name on the Bond, which was otherwise before the Bond was taken.

The Lord Chancellor put the Defendant to prove, that the Testator Ellwall gave particular Notice to the Plaintiff, that he had sold on Trust, and to whom; whereupon a Letter of the Testator to Dashwood was read, wherein he gave Notice of the Sales to Bartlet and his Failing. The Bill was referred to a Master.

Nota. There was no Notice of the Bond in the Name of Elway not till after Bartlet was failed.

Newcomb *and* Dorothy *Uxor contra* Bonham *and* Alice *Uxor.*

Mortgage.

ANthony Young being seised in Fee of Lands, and a House and Mill of 100 l. per Ann. Value, (the Plaintiff's Proof was 114 l. the Defendant's Proof 95 l. the Medium 103 l. or thereabout) and being indebted 1000 l. and his Mother seised of 60 l. thereof, to receive out of the Premisses in Possession for her Life, the Reversion to him, agrees with the Defendant who had married Alice his Sister, that if he would furnish him with 1000 l. whereby he might be enabled to pay his Debts, and have no Interest for it during the Life of Anthony, unless he, viz. Anthony Young, during his Life should think fit to repay it with Interest, then he would so settle the Premisses, as that he might enjoy the Premisses during his Life, and that the Premisses should be settled to come to the Defendant and Alice his Wife for their Lives, and to the Heirs of the Defendant after his Death, and that he should have Power during Life to redeem on Payment of the 1000 l. with Interest; but his Heir should have no Power after his Death to redeem, but the Defendant should absolutely enjoy the Premisses, and gave this Reason, viz. that he might marry and have Children, and therefore would have Power during his Life to redeem, but his Heirs should not, and gave such Instructions to draw Assurances accordingly; which was accordingly deposed by the Party who drew the Assurance. The Assurance drawn was a Conveyance to Bonham and his Wife, and the Heirs of Bonham; and Bonham and his Wife redemised the Premisses to Anthony Young for 99 Years, if he lived so long, and a Covenant,

nant, that if Young during his Life should pay to Bonham 1000 l. with Interest from the Deed on six Months Notice, then Bonham and his Wife to reconvey, and in Inforcement of the Defendant's Title against a Redemption by the Plaintiff Dorothy the Heir of Young, who was the Daughter of Young's Brother. It was proved that she had offended him, and he had declared she should not inherit him; that Alice being his Sister, he had Kindness for her. And this Case was not like other Mortgages which are mutual.

But a Redemption was decreed by the Lord Chancellor, and the Personal Estate to be applied to aid the Heir towards Satisfaction of the Mortgage, because it was a Security, and being so, could not be extinguished by any Covenant made at the Time of the Mortgage. The Defendant prayed a Re-hearing. 'Tis true, that if it were a Mortgage, no Covenant should alter it, but this is not a Mortgage, but an Especial Contract, made not in Consideration of lending of Money, but on Consideration of Blood and Accommodation of the Affair and Necessity of Anthony Young, and to settle his Estate in his Blood; for he was resolved, before this Conveyance was made, on two Things. 1. By Reason of the Unkindness of his Neece to him, that she should not have his Land as Heir. 2dly. That if he had no Issue of his own, that then the Defendant Alice should be his Heir and have his Land. But then he considers his own Condition, viz. he was indebted 1000 l. which chargeth him until that were paid, with 60 l. Interest per Annum, besides incident and increasing Charges by renewing of Bonds, Brokage, &c. And as to the Condition of his own Estate to answer the Debt and Interest of his Debt, his own Estate was in Possession but 40 l. a Year, which could not answer the Interest, viz. 60 l. nor ever satisfy the Principal, neither could he have 1 d. out of his Estate to maintain him.

Thereupon he further considers what Way to take to debar his Neece who had disobliged him so highly, as to beget in him such a Resolution as that she should not have his Land, and to prefer his Sister who was nearer in Blood than his Neece, to which he had three Motives, viz. The Nearness of Blood. 2dly. Kindness of the one and Unkindness of the other. 3dly. His Sister had Children, but his Neece had none. So that probably if his Sister had his Land, then it would remain in his Blood still, of which he saw no Hope in the Neece.

3dly. This Resolution to prefer his Sister was not so absolute, but he would first provide for his own Children if he should have any: This is provided for by the Covenant to redeem during his Life, and the Limitation to redeem only during his Life, provides for his Intention touching his Sister.

4thly. On all these Considerations, he himself contrived a Way that, if it might be effected, will answer all these Ends, viz. Free him from his present Pressure, Want of Maintenance, and free him from present Interest of 60 l. per Annum, give him present Maintenance of 40 l. per Annum, with Expectation of 60 l. more, after his Mother's Death, who was jointred therein, and then he had Hope of a Portion with a Wife to redeem the Estate in his Life-time, and so become a free Man.

And accordingly he makes the Conveyance ut supra, which is not any Way suitable to, or like an Ordinary Mortgage which Scriveners make.

1st. There is no Use to be paid during his Life, so that he is freed from Clamor of his Creditors and Debts.

2dly. There is no Covenant on his Part ever to repay either Principal or Interest, but at his own Pleasure, so no Interest or Principal could be required of him.

3dly. The Land is conveyed to Bonham and Alice his Wife, Sister of Anthony Young, and the Heirs of Alice the Wife, which were a strange and unreasonable Way of Mortgage, that the Husband's Money should be lent, and the Security be the Wife's; but this was to comply with the Intention above, that the Land, in Case he had no Issue, should remain in his Blood.

And it was not unreasonable in that Case, that the Estate must go to Collaterals and Females, to prefer a Sister before a Neece, especially when the Sister had Children, but the Neece none.

Object. Here is a Power to redeem, and it shall never be extinct by any Covenant at the same Time.

Resolv. This indeed is an usual Way of borrowing, no Clause shall alter it.

But this is here a special Contract, on special and necesary Occasion, and is not properly a Mortgage; it is Contractus innominat.

The Mischief of the Objection is, if it should be, &c. then it would be a Way to Oppression, and rigorous Exaction and Oppression of necessitous Men by Usurers, but here it is quite contrary.

The special Circumstances of this Case distinguish it from other Mortgages, and never like to be drawn in Example, for who will lend Money on such Terms, viz.

1st. Never to be able to demand Principal or Interest, but to be wholly in the Liberty of the Borrower, especially considering that the Principal and Interest Money would exceed the Value of the Land, as here, if Alice had lived, it might.

But yet this is a more special Case, viz. Consideration of Blood, and a Consideration not express may be averred, though not express in the Deed, and so we do, and so it appears.

And the worst of the Case amounts to no more than this, viz. if he by Marriage, or otherwise, should not be enabled to redeem, his Sister should have his Land rather than his Neece.

In Case of a Mortgage, the Mortgagee may exhibit a Bill to discharge the Equity of Redemption, and is an Incident to the Mortgage, which cannot be in this Case, &c. Ergo, &c.

The great Reason & econtra, is the Mischief that would ensue to Men in Want, who are enforced to borrow Monies, for their Necessity will induce or inforce them to submit to any Conditions. And therefore in general, and prima facie, the Rule is good, that when a Mortgage is made, no Covenant or Agreement in the Deed of Mortgage shall make it unredeemable on Failer of Payment; and therefore if a Mortgage be to redeem for Years, or during the Life of the Mortgagor or Mortgagee, and not after, the Mortgage in Equity may be redeemed after, for it is a trivial Clause, (not after) and is contrary to Equity in the Creation of it, and would be of evil Consequence, for every Lender would make himself Chancellor in his own Case, and prevent the Judgment of this Court in a Case proper for the Court, and this were a general Mischief.

Therefore

Therefore first consider if there be any Probability of such Mischief in this Case, such as should destroy the express Contract and Agreement of all the Parties made without Surprize or Consideration.

To which End observe how much this Case differs from ordinary Mortgages, and how unlikely to be imitated by Money-lenders, and to be drawn into Practice or Example.

1st. In other and usual Mortgages, Interest is payable till Time of Redemption, here none by Agreement.

2dly. The Non-payment of Interest is not for any certain Time, as for so many Years, but none to be paid during Life, and that during the Life of the Mortgagor himself. Where is that Money-lender that will lend on such Terms? For here he can never know as long as the Borrower liveth, whether he or his Heirs, or his Executors shall be Owners of the Land or Owners of the Money. In Sir Woollaston's Case, a Redemption of a Mortgage at the Suit of other Creditors was denied, because of the Length of Time, because there ought to be a Time when the Mortgagee may be certain of his Interest, either of Land or Money.

3dly. This is enforced from this, That in all Causes of Mortgages regularly, the Mortgagee hath Equity on his Side to have a Decree to bar Redemption on Failer of Payment, as well as the Mortgagor to have Redemption; the Remedy is equitable and mutual. Regularly and ordinarily, this is so, but it fails on the Mortgagee's Side during the Mortgagor's Life. Then 1. This is not an ordinary Mortgage, because not subject to the Rules of Mortgages. 2. And this Circumstance doth make the Case not likely to be mischievous in Consequence, for no Man is like to lend on such Terms.

4thly. The Value of the Land conjoined to these former Considerations is very material; the Land in Possession at most but Value 40 l. per Annum, besides Taxes, Duties to the Church and Poor, and the Reversion of an Estate of a Jointress in Being, and no Possession of the 40 l. per Annum during Young's Life; so in Effect it is a Reversion after one Life of near 100 l. per Annum, viz. 40 l. per Annum, for one Life, 60 l. per Annum after two Lives, and this conveyed for Security of 1000 l. no Interest to be paid during Young's Life.

The 60 l. after two Lives 7 Years Purchase.

Part 60 l. per Annum, A Mill. 600 l. at 7 Years Purchase 420 l.
40 l. after one Life, 9 Years Purchase 360 l.
10 Years 400 l.

So that we have a bad Purchase, &c. if absolute, but, if Young had lived 9 or 10 Years, a miserable Bargain, and yet he might have lived 20, 30, yea 40 Years.

Surely he must be sick of his Money that will take this for a Precedent, so as there is no Fear of the ill Consequence.

Object. Here Young died quickly.

Resolv. He might have lived long, and the Event changeth not the Nature of the Agreement.

What Man in his Senses would go by such a Precedent or Example.

If Young had lived 7, 8, 10, 20 Years, the Court would not have relieved him, much less his Heirs.

Two other Reasons, &c.

1. From the Condition of his Estate.

2dly. Of the Consideration, &c. not only of Money, but Blood and Kindred was the Consideration of the Conveyance.

Object. Consideration of Blood is not mentioned.

Resolv. It may be averr'd, and is fully proved.

The Lord North *Chief Justice, and* Champernoon *contra* Williams. 21 June 1681. S. C. 1 Vern. 13. & Post 78.

THE great and ruling Point in the Case was, whether Cestuy que trust in Tail, suffering a Recovery, and no Tenant to the Præcipe, but being in Possession under the Trustee who had the Freehold in him, but was no Party to the Recovery, but Cestuy que trust in Tail was the Tenant, should bar the Remainder in Fee of the Trust. The Matter was much debated on Reason and Precedents,

Cestuy que Trust in Tail suffers a Recovery, it is good.

sidents. The Lord Chancellor decreed it a good Bar, and took a Difference, viz. if that there had been a Cestuy que Trust of a Trust for Life before the Trust in Tail, so that in Case the Estate in Law had been executed according to the Trust, and consequently the Tenant in Tail could not have barred the Remainder in Fee, if he had suffered a Recovery, there Cestuy que Trust in Tail should not bar the Remainder by a common Recovery, if there was no Tenant to the Præcipe. He said also that a Trust is a Creature of Chancery, and is not within the Statute of W. 2d. de donis, &c. and though if Tenant in Tail of a Trust cannot bar the Remainder by Fine, yet if he makes a Feoffment, or Bargain and Sail, he may bar his Issue.

Vide post 125, 247, &c.

Draper's *Case*. July 1681.

Joint-tenants or Tenants in Common.
1 Vern. 482.
1 Chan. C. 238.
Post 214, 237.

SIR Andrew King made his Will, wherein he deviseth in these Words, viz. All the Rest and Residue of my Estate whatsoever, both real and personal, I bequeath to my Executors, the Survivor and Survivors of them, to the Intent and Purpose, that they do with all Care and Diligence as soon as the Money can be conveniently raised upon Sale of the Premisses, and out of the Rents and Profits which will accrew out of my Office in the Custom-House, the Lease of which, and the Proceed and Benefit thereof I intend should be preserved for the Benefit of my Executors, to pay and discharge all my Legacies and Debts.

Sir Andrew King made Edwards and Draper Executors, and died, Edwards paid the Legacies and Debts, and died; Draper survived, and when all is satisfied, then my Will is, that the Term which shall remain in the Lease of my Office in the Custom-House and the Benefit thereof, shall be and remain to my Executors Share and Share alike for their Care and Pains in Execution of this my Will.

The Executors were Draper and Edwards.

The Question was, Whether the Testator having in the former Part of his Will given all his Estate Real and Personal to his Executors, the Survivor and the Survivors of them, but in the latter Clause given the Term in his Office to them, Share and Share alike, the Executors are Joint-tenants of the Term, or Tenants in

in Common; by the first Clause they are Joint-tenants, but the latter Clause (Share and Share alike) seems to contradict it, and the surviving Executor claims the Term by Survivorship.

Lord Chancellor, If a Man devise to his Executors, or make several Men his Executors, the Survivor must carry all, since the Judges will have it so. (Note; this was his very Expression, vide sup. fo.) Yet when the Testator makes a Distinction between the Term in the Office and the Generality of the Estate, so shall I, and so he decreed the Term to be in Common, not to survive. 1 Chan. C. 238, 9.

Rep. Methinks the first Clause, a Devise to Executors to pay Debts and Legacies, is no Devise or Legacy, prout Dyer.

D E K

DE
Term. Sanct. Mich.
Anno Regis 33 Car. II.
IN
CANCELLARIA.

The Company of Stationers. 15 Novem. 1681.

On Plea and Demurrer.

Stationers Patent Prerogative. Poſt 76, 93, 165, &c.

THE Company of Stationers complain by Bill againſt Lee, for that whereas by Patents the 3d and 4th of Philip and Mary, the ſole Printing and Trading in Almanacks was granted to them; the Defendant did print and cauſe to be printed and vended ſecretly Almanacks, and imported others from Holland, printed there, and ſold them, and prayed Diſcovery. The Defendant demurred and pleaded: The Demurrer was in Effect to the Plaintiff's Title, that it was not good in Law, and that the Bill was only to diſcover a Tort, as if a Bill ſhould be to diſcover a Treſpaſs in Lands or Goods.

The Plea was, that he had been ſeven Years Apprentice to the Trade of a Stationer in London, and Free, &c. And the Cuſtom of London was, that in ſuch Caſe any Freeman might uſe any Trade, &c. The Plea and Demurrer were over-ruled, and the Defendant to anſwer the Bill.

At which hearing the Caſe and Proceedings following were cited.

7 July, 14 Car. 2. Stationers.

Richard Atkins Eſq; and Martha Lady Acheſon his Wife, Plaintiffs, and George Moore, Miles Fleſher, and others of the Company of Stationers, London, Defendants.

It was then alledged, that the Plaintiff, the Lady Acheſon being ſole Daughter and Heir of John Moore, who by Letters Patents from King James, had the Privilege of ſole Printing all Books which concern the Common Laws of England: And the ſaid Moore by his Will made George Moore and others Executors in Truſt for the Uſe and Benefit of the ſaid Dame Martha, to whom he gives all his Leaſes, and ſo the Benefit belongs to the Plaintiffs, and yet the Defendants, &c. do take upon them to print and publiſh the ſaid Law-Books without any Authority from the Plaintiffs, for Relief wherein the Plaintiffs have exhibited their Bill, and the Defendants being ſerved with Proceſs have accordingly appear'd, but have not as yet put in any Anſwer thereunto, as by Certificate then appeared.

It was ordered, that an Injunction be awarded againſt the ſaid Defendants, their Servants, Agents and Workmen, thereby injoining them not to proceed in the Printing of any Law-Books, till the Defendants ſhould directly anſwer the Plaintiffs Bill, and this Court take other Order to the contrary. Vide poſt 76, 165. 1 Vern. 120, 156, 275, 276. 1 Roll. R. 290. M. 30, 31.

May it pleaſe your Lordſhip, We have ſeveral Times met together and conſidered of the Caſe then annexed according to an Order bearing Date the 13th of April, 1668. and are of Opinion, 16 Feb. 1668.

That ſuch new Law-Books as have been imprinted ſince Moor's Patent, and acquired by any particular Perſon or Perſons, are not by Law reſtrained by Moor's Patent. But notwithſtanding that Patent, thoſe Men who have acquired them may print; but as to thoſe Law-Books that were printed before that Patent, there are among us Diverſity of Opinions.

Jo. Kelinge, John Vaughan, Matt. Hale, Thomas Twiſden, Thomas Tirrel, Chriſtopher Turner, John Archur, Richard Rainsford, William Morton, W. Wyld.

Upon hearing Counſel on both Parts this Day at the Bar, to argue the Errors aſſigned by John Streater Plaintiff, in a Writ of Error depending in this Houſe, which Abel Roper, Francis Tytan, John Starkey, Thomas Baſſet, Thomas Collins and John Place commenced againſt John Streater; concerning the Privilege of Printing Law- 26 May 1675.

Books. After due Consideration had of what was offered on either Part concerning the same; it is resolved and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the Letters Patents pleaded in Bar of the Action brought in the King's Bench, were and are good in Law, and that the said Judgment given in the Court of King's Bench for the said Abel Roper, &c. against the said John Streater is therefore erroneous, and shall be and is hereby reversed.

Jo. Brown.

Cleric' Parliament'.

Countess Downes *contra* Moreton. 16th November 1681.

Consideration defective when supplied.
See 1 Chan. C. 34, 49, 78, 99.
Ante 7, 37, 38.
M. 42.

SIR Lucy, late Husband of the Plaintiff, articled with her Father before Marriage in Consideration thereof, and 6000 l. to settle 1000 l. per Ann. in Lands, &c. on her for Jointure, but not mentioning the particular Lands, and after Marriage settled on her int' alia, his Farm in D. called Hasledon and Woods in called A. the Farm Part of it lay as in the Bill named, and Part of 60 l. per Ann. lay not there, and so of the Woods; and if Relief should be here for the Part lying out of these Wills, which were not well conveyed (as it was agreed on all Sides, the Conveyance was so penn'd that they did not pass) was the Question; but afterward the Husband being made Earl of Downe, made a farther Conveyance to some Friends whereby 500 l. per Ann. of other Lands were settled on the Lady for her Life: The Husband died, the Heir entred into that Part of Hasledon Farm, and of the Wood not conveyed. It was proved by many Circumstances, and the Acknowledgment of the Husband, that he had settled the whole Farm of Hasledon; and thereupon the Lord Chancellor decreed it to the Plaintiff. If the Bill had been only to supply the Defect of the Jointure, because it was not included in the Jointure, he would not have relieved, because his subsequent Augmentation might be in Recompence; but the Husband conceiving and declaring that he had settled the Farm, the second was not a Supply of a Defect, but a farther voluntary Provision, which would

Intention.

not have bound his Heir being but voluntary; and therefore as to the Defect of Value in the Woods he did not relieve the Plaintiff, for that as to them there was no Proof of his Intent, that he had already settled them, and tho' his Covenant was to settle 1000 l. per Ann. and there was Want of Value (there were 190 Acres) he would not decree as to them, and did not decree them; yet as to the Farm, he did decree for the Plaintiff not to supply the Value, but as that which he intended to settle, and as he thought he had settled, and so had acknowledged divers Times not to supply out of the Covenant, but to establish what he intended to settle. And yet this being on Marriage-Articles, the Court has in divers Instances since decreed a Performance even against an Heir.

S. C. 1 Vern. p. 85. 137.

Anonymus. 16 Novemb. 1681.

Privilege. The King's Servants arrested.

Conizee of a Statute by Sir Philip Howard took him being now a Servant of the King in Execution. He complained by Motion in Court, of this as a Breach of his Privilege, being Servant to the King, who ought not without Leave to have been arrested. The Party shewed that before he proceeded, he acquainted Sir Philip Howard of his Purpose, and that thereupon Sir Philip Howard waved his Privilege. Lord Chancellor: The Privilege is the King's Privilege, and not Sir Philip Howard's, you have been unmannerly towards the King and broke his Privilege, you might as well have taken the King's Coachman driving the King's Coach. The Party protests all Respect to the King, &c. However, said the Lord Chancellor, I will not discharge the Execution, but deliver the Warden of the Fleet to take him into Custody, but because of the Consent to discharge Sir Philip Howard of Execution, the Chancellor propounded that new Security should be given for the Debt, which the Party by his Counsel consented to, so as it might be a Statute of 2000 l. which seemed to the Chancellor to be too much, because the Debt was but 500 l. Counsel for the Defendant: There are sixteen Years Interest behind; but at last it was referred as to the Manner and quantum of the Security, and the Party discharged of the present Commitment.

Nota. In this Case there was no Bill depending, all came in by Way of Motion.

N. Progers

S. C. 1 Vern. 9. & 137.

N. Progers *contra the Lady* Fraſer, *the ſame Day on a Plea.*

The Caſe was.

Cuſtody of an Ideot to one and his Executors during the Ideocy.
See the new Caſes in Equity, & poſt. 239.
1 Chan. C. 113, 153.

MRS. Dennis being found an Ideot by Inquiſition, the King granted the Cuſtody, &c. of the Ideot, and of her Eſtate Real and Perſonal to Sir Alexander Fraſer, his Executors, and Adminiſtrators during the Ideocy, he died. Progers got a ſecond Grant from the King, and ſueth the Lady for the Lands, &c. ſhe being Executrix of her Husband, and Deviſee of the Cuſtody, which ſhe pleads in Bar. The Queſtion was, whether the Grant to Sir Alexander Fraſer were ended by his Death? First, It is a Truſt in the King, and therefore is not grantable to Executors and Aſſigns. Secondly, The like Grant was never made before. Thirdly, It cannot be ſo granted, for if the Party die Inteſtate, who ſhould take Care of the Ideot, therefore the Office of the Marſhalſea cannot be granted for Years: And fourthly, what Eſtate can the Grantee be ſaid to have?

Econtra, it was ſaid, 1ſt, The King hath not only a Truſt, as in Caſe of Lunacy, but an Intereſt; for he hath and may diſpoſe of the Profits of his own Uſe, and grant them over, and it being a Chattel naturally ſhall go to the Executors of the Grantee, and it is a ſpecial Intereſt, not properly a Term, like Manning and Drake's Caſe, where a Man hath Power to enter and take Profits till 100 l. paid, and Corbet's Caſe, 4 Coke: And in Caſe of Wardſhip there is an Intereſt and Truſt conjoined; for the Law truſts the King and his Grantee to educate and maintain the Ward, and ſo muſt be done in Caſe of Ideocy, as to Maintenance of him or her.

Lord Chancellor ſaid the Caſe of Ideot and Ward are not alike, the Wardſhip is by Reaſon of Tenure, the Ideocy by Prerogative; and ſaid he thought the Caſe of Gaolerſhip not grantable for Years too eaſily ſlipt over. But the Caſe was put off, for he remembred a Defect in the Inquiſition which found Dennis not an Ideot a Nativitate ſome certain Time.

Coventry, &c. *Executors of Sir* Henry Thinn, *contra* Thinn *now Executor of Sir* James Thinn, 18 November, 1681.

Decree for mean Profits after a former Decree for Enjoyment. Vide post 134.

SIR Thomas Thinn 1639. treated with the Lord Keeper Coventry for a Marriage between Sir Henry his Son, by Katharine his second Wife, and Daughter of the Lord Coventry, the Portion 4000 l. which was paid. Hempsford, &c. to be settled on Henry, &c. The Deed of Settlement was executed by Sealing and Delivery of it, it being by Way of Covenant to stand seised, but wanted the Words (Shall be or shall stand seised) and so was in Law defective. Sir Thomas after the Marriage died, great Suits happened between Sir James, heir at Law, and Sir Henry, for Sir James entred on Sir Henry, 1648. Sir Henry Thinn exhibited a Bill in Chancery against Sir James on the Agreement, and had a Decree 1650. against Sir James, which was for Enjoyment, but no further, not for further Assurance or mean Profits; Sir James continued Disturbances. Sir Henry Thinn 1659. brings a second Bill, but that being ill penned, he had Leave to mend it, and made Suit for the mean Profits; it abated by Death once of Sir Henry Thinn; and Sir James Thinn also dying, now the Bill is for the mean Profit.

Against the Plaintiffs the Objections were: 1st. The Length of Time; but that was answered by the many Suits and Abatements of them.

2d Objection. That it is irregular and improper to have a Bill for the mean Profits now, when Sir Henry Thinn had a former Decree for the Enjoyment 1650. for he then ought to have had a Decree also for the mean Profits: And it is to be presumed that the Court did then see Cause to make no Decree for the Profits, in Regard Sir James had a good Title in Law, and the Times were troublesome, and the Possession a fluctuating Possession, sometimes with one of them, sometimes with the other; however 'tis not Reason now to patch up the former Decree by a new one.

The Reply was: 1st. The former Bill demanded not the mean Profits, nor an Account thereof.

2dly. It

2dly. It was not unjust by one Bill first to clear the Title by one Bill, and then to exhibit another for the Profits; and it was not reasonable till the Title was cleared to the Principal, the Manor settled while Sir James set up Titles to the Whole, one while by an Intail which avoided the Settlement, if not cut off; another while for Want of Tenant to the Præcipe in the Recovery which docked not the Intail as to several Tenements.

But those Questions being settled by several Verdicts, now and not before was Time to have an Account; and 2dly, after a Decree for Enjoyment it is proper to exhibit a Bill for the mean Profits, or as the Case may be, for further Assurance or for the Evidences.

And for these two last Reasons, and particularly for the last Reason, the Lord Chancellor decreed the Executors to account for all Profits by him, his Agents and Baily received since the Decree 1650. (Quære, if not the Exhibiting the Bill 1648.) But not for all Profits, which he did or might receive without his wilful Default, as in some Cases is usual.

Perrat *contra* Ballard. 22 Novemb. 1681.

Bankrupt.
Vide post 135, 136, 139, 143, 153, 157, 190 to 193.

THE Defendant bought of Portman Jewels, Plate, &c. for valuable Consideration paid: Portman became a Bankrupt, and a Commission was taken out against him, and the Commissioners examined Ballard, the Defendant, touching the Goods what they were, and the Value of them, but on Pretence that he did not answer, the Commissioners committed him; but on an Habeas Corpus in the King's Bench he was delivered. The Answer before the Commissioners being as to the Time, &c. to his Remembrance, and that he could not positively answer farther, and by Consent he was again to attend and be re-examined, which he did.

And now the Plaintiff's Bill is to have the Defendant's Answer in Chancery, where he pleaded, that he had no Goods of Portman's, but such as he really paid for before the Commission issued against Portman, and that he had no Notice of any Act or Thing by Portman whereby he was a Bankrupt, but truly paid for what he bought, &c.

No Notice pleaded.
Vide ante 6, 20, 47.
Post 122, 126, 161, 246. 1 Chan. C. 34, 38, 143, 232, 252, 291.

It was objected he ought to answer the Time of the Bankruptism, else the Statute against Bankrupt will be of little Effect.

Econtra, It is no Equity to make a Man in such Case pay twice.

Lord Chancellor ruled the Plea good, saying, It is an infallible Rule, that a Purchaser for valuable Consideration shall never without Notice discover any Thing to hurt himself. But as to the Point of Bankruptism, whether that the Defendant being formerly examined by the Commissioners on Oath, should be examined or put to answer to the same Matter here. The Chancellor seemed to be of Opinion that he should. But the other Point being clear, there was no Debate on this Point.

Purchaser.
Vide 108, 128, 135, 195, 208, 223.
1 Chan. C. 36, 247.
1 Vern. 27.

Pit *contra* Hunt. 20 Novemb. 1681.

THE Wife before Marriage being possest of a long Term for Years, and A. the Person who was to marry her being indebted 400 l. to J. S. by Agreement of A. and J. S. makes a Lease to J. S. for ten Years to secure Payment of the 400 l. the Lands being then accounted 80 l. per Annum, as is alledged, and by Indenture sealed in Presence of her Husband, assigns the Residue of the Term to Friends in Trust to be at her Disposal, whether Sole or Covert, (but no other Words then, so to exclude her Husband) and brought in Money and other Estate to the Value of 600 l. She marries; after the Creditors of her Husband (after June 1674.) obtain Judgment in Debt against him. And on Fieri fac. the Sheriff sells the Residue of the Term; the Vendees have now a Decree against the Trustees of the Wife for the Term, because the Lords in Parliament had reverst a Decree obtain'd by the Lady Turner who married Sir Edward Turner, who sold Land wherein Trustees for her had a Term for Years; and the Chancellor held it not fit a Decree should be one Way in Parliament, and in another Way here, but declared it against his own Opinion; for else Widows cannot in most Cases provide for themselves. Vide Awcher's Case, &c. and the Husband in this Case forsook his Wife, refused Reconciliation, allowed her nothing, &c. yet decreed ut supra.

It seems to me that this Case differs from Turner's, first because there the Assignment of the Term was on a former Marriage, which Husband being dead, she became Owner of the Trust as a Feme Sole, and as to the second Husband all one, as if she had created a Trust for herself of a Term. Secondly, the Assignment here is with Consent of the Husband, whose Creditors can have no more Right than he had, but Turner did not consent, &c.

S. C. 1 Vern. 21.

Newland *contra* Horſman. 23 Novemb. 1681.

Charter-party. Maſter, Merchant, foreign Servants examined. Ante 6, 11, 36, &c.

HOrſeman being Owner of the Ship called, &c. whereof Ford was Maſter, B. the Plaintiff treated with a Friend of Horſeman's for Hire of the Ship, and a Charter-party was ſealed by B. and Horſeman, by which Horſeman agrees that the Ship ſhall ſail to New England to take in Fiſh on the Account of Newland, and thence to Barcelona, and there to deliver the Fiſh. Newland covenants with Horſeman to pay the Freight on Delivery of the Fiſh; the Ship arrives at Barcelona, and the Fiſh is delivered to one Dalmaſie: Ford the Maſter demanded of Dalmaſie the Freight, and Dalmaſie demands a Deduction out of the Freight, pretending that there wanted 170 Kintals of Fiſh of what was to be delivered, and that the Part of that which was delivered was damaged; thereupon the Maſter ſues Dalmaſie in the Court at Barcelona for Freight; Dalmaſie ſues likewiſe for Deduction of Damage; the Court there ordered the whole Freight to be brought into Court, and Conſideration to be had for Damages for Dalmaſie; thereupon Dalmaſie appealed to a ſuperior Court; then Dalmaſie removed the Appeal on Pretence of preventing ſeveral Appeals; the Maſter finding his Freight lodged ſo that he could not have it till the Cauſe was heard in the higheſt Court, which was not like to be in ſome Years Time, comes away without any other Freight or Reading there for his Principals Account, which he could not help for Want of the Money for his Freight; then Horſeman ſues Newland on the Charter-party for his Freight here; Newland exhibits his Bill in Chancery to ſtop the Proceedings here, tho' the Suit was only to recover Damages, and not for the Penalty. The great Debate was, whether the Proceedings at Barcelona being judicial, and began there by Ford Maſter of the Ship, and Sentence there obtain'd by him, ſhould conclude and bar the Defendant, he having cauſed Money to be brought into Court there, not as excluding the Juriſdiction of this Court by the Sentence there, but that the Court ſhould have Regard to the Sentence, and inſiſted that Newland acted here for Dalmaſie, and that Dalmaſie was the principal Factor, and not himſelf, and, in Caſe there ſhould be a Recovery againſt Newland, he was without any Remedy againſt Dalmaſie, which laſt Matter

ſeemed to ſtick with the Chancellor; whereto the Counſel for Horſeman offered, that Horſeman did conſent that Dalmaſie might take out his Money again at Barcelona, and to make any Inſtrument for that Purpoſe; and they denied that Dalmaſie was the principal Merchant, for had it been declared to Horſeman, that Dalmaſie was the principal Merchant, and muſt have ſought Remedy againſt him, Horſeman would never have let his Ship to Dalmaſie being a Stranger to him; and there is no Probability that he would let his Ship to Freight to one that he had never heard of, nor had any Thing to do with; and inſiſted further, that though Dalmaſie were the principal Maſter, and Newland his Agent, yet that will not concern Horſeman, unleſs Horſeman or his Agent had Notice of it, which they never had. And though Ford ſued Dalmaſie in Barcelona, that may not prejudice Horſeman nor Ford, becauſe he could not otherwiſe do, for by the Courſe of Merchants, the Receiver of the Merchandize is to pay Freight upon the Receipt of the Goods. It was not poſſible for him to recover the Money any other Way, or againſt any other Perſon, Newland being in England, and Horſeman had inſtant Neceſſity for the Money to relade the Ship back again, ſo the Suit was not a Matter of Election but Neceſſity.

The Lord Chancellor. If the Cauſe had been fully determined at Barcelona, then——but the Cauſe is not fully determined at Barcelona, for the Damages are not fully aſcertained. In Concluſion, he ordered that Horſeman ſhould proceed to a Trial againſt Newland upon his Covenants, and therein give in Evidence the Non-payment of his Freight, and what Damages he had thereby, and that Newland might give in Evidence of the Mitigation of the Damage, and delivered no Opinion how far, or whether Dalmaſie was the principal Merchant or not, but would conſider that, when ſatisfied in that other Point. Thereupon the Plaintiff's Counſel prayed a Commiſſion to Barcelona to examine to that Point, which was oppoſed by the Defendant's Counſel, being Publication was paſt and nothing proved in the Cauſe of it. Foreign Judgments.

Churchill. This Objection is raiſed by the Court, and aroſe upon the Debate, and was not in Iſſue before, and is to be tried by Letters Reſident in that Place, as well as here. Commiſſioner to examine after hearing on new Matters ſtarted at the Hearing. Poſt 79, 80, 81, 217, &c.

Chancellor. Take a Commiſſion, and examine to it, if you will conſent to go to Trial next Term, and return the Commiſſion before the Term, and go to Trial, whether the Commiſſion be returned or no. To which the Plaintiff and his Counſel aſſented; but moved firſt, that the Defendant might name Commiſſioners that the Plaintiff may not be delayed for Want thereof. Secondly, That the Return of the Commiſſion might be by the Poſt, and not in the uſual Way, may be allowed; and therefore the Lord Chancellor directed that the Commiſſion ſhould be delivered to Mr. Herne, to ſend the ſame by the Poſt to Barcelona, and when executed to receive the ſame back.

By the Poſt.

Company of Stationers Caſe. 28 Nov. 1681.

Printing.
Injunction before Anſwer.
Vide ante 66, 68.
Poſt 93.
1 Chan. C. 80.
M. 30, 31.
Ante 67.

THE King granted to the Company of Stationers the Printing and Vending of Statute Books. The Defendant cauſed the Statutes to be printed in Amſterdam, and in great Bails and Quantities to be imported to ſell where they remained. The Plaintiffs exhibited a Bill complaining of it. The Defendants appeared, but the Time of Anſwer was not expired till the 1ſt of October; I moved that the Books might remain at the Cuſtom-houſe till Anſwer. On Debate,

Statute-Books.

The Lord Chancellor ordered an Injunction to ſtay the Books there, not only till Anſwer, but in perpetuum; for the Printing of the Laws was Matter of State, and concerned the State. But for other Books, viz. The whole Duty of Man, and other like Books being imported and ſtaid, he left them to the ordinary Courſe.

Taulurier *contra* Ward. 19 Decemb. 1681.

Where one of two muſt loſe, he loſeth that truſteth moſt.
Loſs.
Fraud.

TAulurier had a Decree in Chancery for 600 l. which was to be placed out on Security, in the Names of Markfield a Clerk in Court, and of Buchannon; Markfield would not intermeddle, Buchannon received the 600 l. and the 3d of December lent it to Sir Richard Dutton, who entred into a Statute of 1200 l. to Buchannon for the Payment. Taulurier was preſent at the Lending. Afterward Buchannon, who was uſually employed by Ward the Defendant

in Lending out her Money, told her that a Friend of his had Occasion to borrow 600 l. but would not be known to any but Buchannon, nor give Security to any but to him; but he (viz. Buchannon) would assign the Statute to her, &c. Whereupon the 29th of December she took an Assignment by Deed from Buchannon of the Statute, and the Statute which remained in Buchannon's Hands was delivered to Ward, and she paid the 600 l. to Buchannon, who pretended he dealt for Sir Richard Dutton: After Buchannon died intestate; Taulurier obtained Letters of Administration of Buchannon quoad the Statute; Ward had the Statute; Taulurier could not sue the Statute at Law, because she had it not to shew, and Ward could not sue the Statute, because he was not Administratrix.

Now Taulurier sues Ward in Chancery; one of them must be cozened; and the Question was who should be the Loser.

Mr. Solicitor pro Quer. We have Equity, we paid 600 l. we have the Title in Law by the Letters of Administration.

Dangerous to take Security from a Trustee without Enquiry.

But econtra, it was objected for the Defendant. Ward is not Plaintiff, but Defendant; she demands not any Thing from the Court; by the Grant of Buchannon we have at least Property in the Wax and Parchment; the Question is, whether the Court shall take that from us, who have without any Fraud lent really our Money. Besides Taulurier trusted Buchannon with the Statute, and Buchannon deceived her; and the usual Practices of the Court is, If a Creditor trust the Scrivener with the Custody of his Bond or Security, and the Scrivener receive and mispend the Money, the Creditor shall not recover against the Debtor, for it was his Fault or Neglect to trust the Scrivener.

Resp. pro Quer. If the Debtor takes not up the Security when he pays, &c. and the Creditor obtains the Bond, and so hath Remedy at Law, there the Debtor trusts the Scrivener.

Winnington. The Statute is dated the 3d of December, Ward lent not her Money till the 29th of December, and she never spake with Dutton, which was a great Neglect in her and a Folly; if she had inquired of him, he must have warned her, and how could she lend the 29th of December, a Security the 3d of December?

Rawlinson

Rawlinſon. The Treaty with Ward was in the Beginning of December, and the Security was preparing that while, till the 29th of December.

Chancellor. Do you prove the Day when you firſt treated.

Rawlinſon. We prove it about the Beginning of December.

Chancellor. Ward ought to have inquired of Dutton. Is there any Appeal brought from your granting the Adminiſtration?

Reſponſ. No.

The Chancellor decreed for Taulurier.

S. C. Ante 63, 64. 1 Vern. 13.

Sir Francis North *Plaintiff*, Champernoon *and others, Defendants.* 17 Decemb. 1681.

32 Car. 2. Ceſtuy que Truſt in Tail ſuffers a Recovery, the Remainders are barred.
See 1 Chan. C. 68, 49.
Ante 63.
1 Vern. 13.
1 Ventr. 350.

SIR Francis North purchaſed Lands in Eſſex; the Fee of ſome Part of the Lands were in Truſtees, but the Truſt was, after Debts paid, to Richard Allington in Tail with other Remainders over; Richard Allington the Ceſtuy que Truſt in Tail ſuffered a Common Recovery with double Voucher to bar the Remainders over limited by Way of Truſt, but no legal Tenant to the Præcipe, for the Freehold was in the Truſtees who were no Parties to the Recovery. And the great Queſtion was, Whether the Recovery did bar the Remainder in Truſt, for the Plaintiff's Title was under that Recovery.

The Decree is in theſe Words: His Lordſhip upon long Debate of the Matter, on hearing what was alledg'd by the Counſel on either Side touching the ſame, declared, That he was fully ſatisfied that the ſaid Recovery did ſufficiently bar all Remainders depending upon the Eſtate Tail of Richard Allington, who ſuffer'd the ſame, it being a general Rule, that any legal Conveyance or Aſſurance by a Ceſtuy que Truſt ſhall have the ſame Effect and Operation upon the Truſt, as it ſhould have had upon the Eſtate in Law in Caſe the Truſtees had executed their Truſt; otherwiſe Truſtees, by refuſing or not being capable to execute their Truſt, might hinder the Tenant in Tail of that Liberty to diſpoſe of his Eſtate and bar the Remainders, which the Law gives him as incident to his Eſtate, which would be manifeſtly inconvenient, and tend to the Introducing of Perpetuities, and doth therefore think fit, and

ſo oꝛder and decree that the ſaid Defendants Arthur Champernoon, Alice Champernoon, and Elizabeth Way, in Purſuance of certain Articles executed by them to the Plaintiff foꝛ Purchaſe of the Manoꝛ and Reſtoꝛy, and Advowſon of the Church of Harlow, &c. in the County of Eſſex, do foꝛthwith make a Conveyance of the ſaid Manoꝛ and Pꝛemiſſes to the Plaintiff and his Heiꝛs, and that the Defendants Anthony Cozen and Elizabeth his Wife, (who is Daughter and Heiꝛ of the ſuꝛviving Truſtee) in whom the Eſtate in Law of the Pꝛemiſſes reſteth, and the Defendants Humphrey Williams and Dorothy his Wife, and Thomas Doꝛſton Senioꝛ, and Bridget his Wife, who are the Heiꝛs at Law of the ſeveral Teſtatoꝛs, and are to receive Legacies upon the ſaid Sale, and all other Parties concerned do join therein. And it is alſo further oꝛdered and decreed, that the Loꝛd North do pay the Debts and Legacies, &c. ſome being Infants, and their Legacies were to be paid to their Parents on their own Security, which was to be allowed by a Maſter, and thereon the Plaintiff to be diſcharged of it.

If a Commiſſioner in a Cauſe be himſelf to be examined as a Witneſs, he muſt be firſt examined; and if others be beforꝛe him examined in his Pꝛeſence, he cannot be afterwards examined, having heard the foꝛmer Examinations: And foꝛ that Cauſe the 17th of December 1681. a Commiſſioner who had ſo done, came up afterwards, and was examined in Court. His Depoſition was ſuppꝛeſſed ex Motione Mꝛ. Hutchins.

Anonymus.

An Account referred.

THE Maſter examined one Witneſs three Times to the Matter of Account. Witneſs. Examination.

Ordered, The Depoſitions be ſuppꝛeſt. Poſt 80, 81, 84, 214, 217.

Exton

Exton, &c. *contra* Turner. 17 Decemb. 1681.

Witneſs.
Ante 79.
Poſt 81, 84, 214, 217.

THE Plaintiff Cornelius Burton, and ſeveral other Creditors of John St. John, ſued Martha Turner, the Defendants inteſtate, examined Witneſſes, and the Cauſe heard. The main Queſtion at the Hearing was, whether the Defendant, at the Time of his Purchaſe of the Manor of Sapcot, had Notice of the Plaintiff's Title? And that Point being directed to a Trial, a Verdict paſt for the Plaintiff. But Complaint was made to the Court, that the Plaintiff at the Rolls, after the Hearing, got an Order ex parte, to ſtrike out the Name of Cornelius Burton; and that being done, ſaid Cornelius Burton was uſed as a Witneſs at the Trial, which ſurprized the Defendant, and the Court ſet aſide that Trial, and Cornelius Burton again made Plaintiff afterwards. The Bill abated by the Death of Martha Turner, and the Defendant Turner is her Adminiſtrator. Exton and ſome of the other former Plaintiffs, without Burton and two others, formerly Plaintiffs, exhibit the new Bill to revive the former Suit. To which the Defendant pleaded the Order, that Burton ſhould be Plaintiff, and that a Reviver of the former Bill makes Burton Party to the Suit; and this is an Act by leaving him out now, to make him by a Trick to be a Witneſs, and the Suit cannot be revived in Part, but the whole Proceedings, viz. Bill, Anſwer, &c. and all Orders muſt ſtand reviſed; which the Plaintiffs Counſel did agree. A ſecond Point was, The Bill was an original Bill, for having ſet forth the Premiſſes, and the Direction to try Notice or not, they now alledge that Burton had releaſed his Intereſt to the Plaintiffs and their Truſtees, and that they had ſeveral material Witneſſes aged and infirm, who may die before the Trial, and pray Anſwer, and that they may examine their Witneſſes. The Defendant alſo demurred to this Part of the Bill, and was over-ruled to anſwer within a Week, or to pay Coſts.

Bills of Revivor.
Vide ante 7.
1 Chan. C. 37, 152, 174.
Curſ. Canc. 210, 220, 301, 402.

Nota: Where divers are Plaintiffs, and the Bill after Hearing abates, ſome of them without the Reſt may revive the Cauſe.

2d. Examination after Publication and hearing in a Bill of Revivor, in the new Cause; yet it was declared and agreed by Sir John Churchill, &c. of Counsel with the Plaintiffs, that such Depositions could not be read in this Court; but the Cause being abated by Act of God, viz. the Death of the Defendant, it is proper to examine Witnesses in Order to the Trial, which the Court hath already in the former Cause directed; and those Plaintiffs, who now are not Plaintiffs to revive the Cause, have released, and the Examination of Witnesses is only to use them at the Trial, not here. Quære, How it shall judicially appear to the Court that there are such Releases; and Quære how Burton's, or any others who cannot be read in this Court, nor could not have been read if examined, shall be made use of in Trial of an Issue being meerly Matter of Equity, as Notice of a Trust, &c.

Examination after Publication, &c. Depositions not to be read.

Where Depositions in a Cause dismist, &c. shall be read or not, see 1 Chan. C. 73, 175, 236. Vide post 250.

Q. 1 Vern. 52, 122. Post 180.

Examination. Contempt.

M D E

Conyers contra Hamond. 7 February 1681.

Place Bill and Int. the Money refer'd.

T

Examination after Publication and Hearing in a Suit of Revivor, in the new Court; yet it was ordered and agreed by Sir John Cook &c. at Council held with the Depositions, that such Depositions could not be read in this Court, that there are such Rebutter, and the Cause to be heard, not here. Quere how it shall judicially appear to the Court that there are such Rebutter; and Quere how Publication, or any other Step, ought to be taken in this Court, that there are such Rebutter.

Examination after Publication, &c. Depositions not to be read.

DE
Term. Sanct. Hill.
Anno Regis 33 & 34 Car. II.
IN
CANCELLARIA.

Q. 1 Vern. 57, 122. Post 180.

Harvey *contra* Harvey. 18 January 1681.

Examination. Contempt.

SIR Thomas Harvey the Plaintiff, had a Decree against the Defendant, for the Surplus of the Estate of Sir John Harvey as Residuary Legatee: The Process to discover the Estate went so far as a Sequestration, and Sir Thomas Hanmer was prosecuted on Contempt, for that the House wherein the Testator's Goods were, being secured, and the Trunks by former Order lock'd and sealed, Affidavit was made that a Smith in Disguise on Friday broke open the House, that then the Chests, &c. were opened, and carried away, and Goods, &c. and that Sir Thomas Hanmer was then there with others, and he being now prosecuted for the Contempt, was ordered to be examined on Debate.

Conyers *contra* Hamond. 7 February 1681.

Place sold and lost, the Money restor'd.

THE Defendant sold a Commissary's Place in the King's Troops for 400 l. to the Plaintiff, who after he had enjoyed the Place three Years, was turned out, and another put in his Room; and as the Bill supposed, by the Defendant's Means or Procurement, without any Fault of the Plaintiff, which was not proved, it was insisted on by the Defendant's Counsel.

1st. This is not a Cause proper for the Court to relieve: A Contract of this Nature being a Bargain for a Place or Office of publick Trust and Concern, viz. to take Musters, &c. and tho' being concerned in Military Affairs, is out of the Statute, yet the King may be abused, and false Musters allowed.

2dly. He was displaced by the Commissioners of the Treasury.

3dly. Had enjoyed the Place and Sallary 5 s. per diem, and made other Advantages: And the Cause had been heard before the King at Council-table, and no Relief given him.

Lord Chancellor. I wish a Law were that such Bargains might not be; they occasion Deceit to the King, &c. but seeing the King hath not disallowed them, the Plaintiff shall not lose his Money; and therefore what the Defendant hath received, he shall repay.

Churchill in the Debate took a Difference between this Bargain, for a Place subject to such Contingencies, where the Party may be removed at Pleasure, and a Bargain of Land on a defeazable Title: Ad quod non fuit responsum, but decreed ut supra.

Perrie *contra* Roberts. 11 February 1681.

S. C. 1 Vern. 34.

A. was indebted to B. by Bond, and C. bound as Surety for A. and A. was likewise indebted to B. by Contract in other Money. A. and B. came to account of both Debts, and stated in toto to be 84 l. A. after in Satisfaction of his Debt, makes over certain Goods of less Value; but there was no Declaration, whether the Sale or Money for the Goods was to be in Part of one Debt or other, but generally. C. the Surety would have it paid on the Bond, and thereby to discharge him. B. the Creditor would take and make Use of it as in Satisfaction of the Contract-debt; for A. was insolvent, and so else he might lose his Debt; and rather than so, he should apply the general Payment to what Debt he pleased, viz. to the Satisfaction of the Debt by Contract, for which he had no other Security; or else A. being now grown insolvent, he must lose it; and it were hard when he hath a just Debt in Law and Equity to be ex-

General Payment where two Debts, See 1 Vern. 24 & 35.

pounded out of his Debt by Interpretation of a Payment generally made.

Sollicitor Finch. The Sale was a further Security for both Debts, and so for his Bond-debt he hath two Securities, the Sale and the Bond; and he who hath two Securities may help himself upon either.

Lord Chancellor. If there had been two Debts, and a Sum of Money be generally paid, the Creditor may elect and choose after to what Debt to apply it when on Payment the Debtor made no Distinction how he paid it; but this Payment being pursuant on a precedent Account of both Debts, the Payment shall be intended according to the Account, viz. on both Debts, and so shall be proportioned ratably on both Debts.

The Master of the Rolls had so ordered before, and his Order being now disputed, was confirmed on Re-hearing, and the Surety pro rata discharged.

Anonymus. 18 February 1681.

No Discovery of Witnesses.
Ante 79, 80, 81.
Post 214, 217.

MOtion was made that the Defendant might discover the Names of the Witnesses to a Deed; by which the Defendant claimed by his Answer, which the Plaintiff by Bill charged to be antedated; but the Antedating denied by Answer.

Lord Chancellor. That may tend to prepare or otherwise to tamper with the Witnesses, and therefore denied the Motion; but if there were apparent Suspicion, it may be.

Popley *contra* Popley. 20 February 1681.

S. C. 1 Vern. 36.
Q. 1 Vern. 28, 29.
1 Chan. C. 271, &c.
Alienee eased by the Executor.
Ante 5.

DEclared by the Lord Chancellor, That not only the Heir, in Case he be charg'd with Debts of the Ancestor, but a Devisee of the Land, shall be unburthened too of a Debt lying on the Land by the Personal Estate in the Hands of an Executor or Administrator, and so shall a Devisee of a Mortgage. In the principal Case the Question was, whether a Sum of Money were a Debt or Duty in Law or Equity, and being a Charge in Equity, a Decree was, that it shall be paid out of the personal Estate, and lessen the Widow's customary Moiety in the Province of York:

Debt in Equity,
Ante 5.
2 Ventr. 349.
1 Chan. C. 297, &c.

If it were a Debt in Law or Equity, then it should come in and be deducted in the first place, and lessen the Widow's Moiety; and being here a Duty in Equity, it was so decreed: But a Legacy could not be so deducted. N. B. 1 Chan. C. 271. & vide M. 19, 20. Vide ante 5.

Howell *contra* Waldron. 24 February. S. C. 1 Vern. 26.

LEgatee Infant sueth in a Court Ecclesiastical, and pending that Suit, sueth in Chancery: The former Suit depending being pleaded, the Plea was disallowed, for there is no such Security as for the Infant's Advantage as here, and possibly not for Interest if placed out, and for bringing in Account here, &c. Lis pendens. Court Ecclesiastical. Post 115, 116, 201, 223.

DE

DE Termino Paſchæ, Anno Regis 34 Car. II. IN CANCELLARIA.

Anonymus. 26 April 1682.

Where the Iſſue is a Purchaſer of a Poſſibility, and where it is a Limitation.
See 1 Chan. C. 8, 9, &c. 146, 266.

WIlliam Bullock poſſeſt of a Leaſe for 1000 Years, on a Treaty of Marriage between him and Sir John Knight, to be had between Henry Son of William, and Bridget Daughter of Sir John Knight, aſſigns the Leaſe to Sir John, &c. on Truſt; Firſt, William to receive the Profits till the Marriage, then Henry to receive the Profits ſo long as he ſhall live, and no longer; then after his Death Bridget to receive the Profits during her Life, and no longer; and afterward the Iſſue of the ſaid Henry and Bridget between them to receive the Profits ſo long as any Iſſue of their Bodies ſhall continue, with Remainder over. The Marriage is had, Iſſue born, Henry aſſigns all his Intereſt to his Father, the Iſſue dieth, Bridget dieth, William takes Adminiſtration of Henry, Sir John Knight takes Adminiſtration of Bridget and the Iſſue. The Queſtion is quid Juris on a Bill exhibited by William and Sir John Knight, Truſtee and Adminiſtrator of Bridget, and the Iſſue?

On Debate the Lord Chancellor ordered the Aſſignment to be brought to him, (for ſome Differences were alledged to be in the Words of it) and when he had peruſed it, he would declare his Opinion.

1. The main Queſtion was, whether as this Caſe is, the Iſſue were a Purchaſor, or whether it were in the Nature of a Limitation.

2. If the Aſſignment being ut ſupra, paſt away the Intereſt of the Wife, if it were a Limitation. 1ſt. In Regard of the Coverture, viz. the future Intereſt and Poſſibility (for it being made for her Preferment in Nature of a Jointure, it was agreed it could not hurt her during her Life.) But 3dly, Whether this Poſſibility were grantable, or not?

The following Caſe cited by the Lord Chancellor *in a Cauſe of* Bradburne *contra* Amand.

THE Lord Dacres imployed Crompe to purchaſe Land for him, and to take up Money to pay for it, which Crompe did, and took the Purchaſe in his own Name; the Lord Dacres ſued Crompe in Chancery, to have the Lands on Payment of the Monies, but Crompe on other Occaſions had mortgaged, ingaged for, and on Behalf of the Lord Dacres, and inliſted for them alſo. And the Lord Dacres could not have a Decree, but muſt pay the one Monies as well as the other, by Decree of the Lord Bridgman.

Pay all or none.
Poſt 98.
Ante 35, &c.

Hele *contra* Hele. 28 April 1682.

THE Bill was by the Plaintiff, Widow of Sir Henry Hele, to have a Jointure of 300 l. per Annum ſettled on her, and the main Queſtions on the Caſe were two, viz. Sir Thomas Hele had three Sons, Thomas, Samuel, and Henry the Plaintiff's Husband, and a Brother Richard, Father of the Defendant Richard Hele. The Eſtate was ſo ſettled, that Henry Hele the Plaintiff's Husband was ſeiſed in Fee-ſimple of ſome Lands, and of Lands in Somerſetſhire which were his own Inheritance; and on Treaty with Mr. Elliott, Father of the Plaintiff, for a Marriage between him and Jane the Plaintiff, Daughter of Elliot, it was agreed the Marriage, &c. and near 3000 l. Portion; 1900 l. of the Portion was paid, and the Reſt ſecured, and Mr. Elliot took a Bond of 6000 l. to himſelf in Truſt for the Plaintiff. The Condition was in Effect to ſettle on Jane 300 l. per Ann. of Lands, in the County of Devonſhire, Cornwall and Somerſetſhire, of the Value of 300 l. per Ann. but no particular Lands expreſſed; Samuel, the elder Brother of Henry, had by his Will ſettled divers Lands on Truſtees (Defendants alſo) and gave Power to Henry to make a Jointure to ſuch Wife as he ſhould

Jointure.

Marriage.

Ante 23, 28, 29, 30. 1 Vern. 29, 40. Poſt 98, 99, 172. and Lord Coventry's Caſe.

N. B. This Caſe depends on the equitable Execution of a Power. Vide Max. 58, 59, &c.

should marry of the Barton of Fleet Damarell, (but he was Tenant in Tail of all) that Barton (except the Capital Messuage and some Lands Parcel thereof Value 50 l. per Annum) was entailed, so that Henry who inherited that Intail, had only such Power on the Capital Messuage and those excepted Lands.

Henry makes his Will, and devises all the Lands which he had to Richard the Defendant in Tail, and dieth without Issue; the Lands which Richard hath by the Will, &c. are of great annual Value. But the Plaintiff's Portion 3000 l. paid, and no Jointure made, for which she now sueth; and two Objections (inter alia not so considerable) were made against her, viz.

1st. Tho' it be charged in the Bill that there was an Agreement precedent to the Bond, that 300 l. in Lands should be settled in Jointure, and after Bond, &c. to settle it, is particularly denied by the Answer and insisted, and no Proof made of it; and therefore the Obligor had Election to pay or settle and avoid Payment by Settlement, and by Chance might so declare, viz. that he would not be bound to settle, but would be at Liberty, and we are content the Plaintiff take Advantage of the Penalty, but are not to be forced to the one, if content to submit to the Penalty. Henry Hele could have no more imposed, a fortiori, nor the Defendant.

Resp. 1. The Bond is but a Security for the Jointure to be made, and of Necessity supposeth a precedent Agreement that such a Jointure should be made: First, it is agreed what shall be done: In the second Place, the Treaty and Agreement is, how that which is agreed on shall be secured, and in such Case the Security commonly is penal, but the Penalty can never be demanded in Equity, the Party performing that, for non-doing whereof the Security or Penalty is given.

2. It is unreasonable that the Obligor should be at Liberty never to perform the Thing secured, and the Person secured not able to ask the Penalty, as indeed he can never demand it in Equity. If the Obligor should sue in Equity on the Loss of his Bond to have the Penalty, it would be Pain; and if he in Equity ask in the Disjunctive, that he might either have the Penalty, the 6000 l. or the Jointure (supposing

(ſuppoſing the Lands were in Truth certain) Chancery might decree the Jointure, but would never decree the Penalty, though the Chancery would perhaps impoſe ſome other reaſonable Penalty on Non-obedience, but certainly never decree the 6000 l. unleſs the true Value on Diſobedience amounted to as much.

3. And it is not reaſonable nor Equity, that in Caſe of a Marriage-agreement, and the Portion paid, that Strictneſs of Law ſhould hold on one Side, and the Benefit to avoid it too, and the other Side have no Liberty; but if he ſhould attempt to have the Advantage in Law of the Penalty, to be ſtopt in Equity when the other Party would, and yet if he would be content with Equity, not to be ſuffered to ask it tho' it be due.

4thly. The Caſe is the ſame in Equity, if the Condition had been to have had certain Lands for Jointure, as when it is general; I ſay the ſame as to this Objection.

Therefore the principal Scope of the Parties being for a Jointure, and the clear Oeconomy (pardon the Expreſſion) of the whole Agreement being that, without all Doubt the one or the other ought to be had, viz. the Jointure or the Penalty. If Things be brought to that Paſs that one of the two is become impoſſible (that is, unpracticable, or as Circumſtances of the particular Caſe are, not accompliſhable) then that Part of the Agreement which is feazable ſhall be performed.

Eſpecially if it fall out to be in ſuch State or Condition, by the Act, Fault or Negligence of the Party who had once Election to do otherwiſe; for ſuch Act or Neglect determines the Party's Election at Common Law, and in Reaſon and common Juſtice; yea, tho' it fall out by the Act of God or of a Stranger, and without the Parties Fault; wherein I hold the Differences to be two; Firſt, between an Agreement or Covenant to do in the Diſjunctive one Thing of two, and where there is a penal Agreement to do one Thing of two; as if I covenant to enfeoff a Man, or make a Jointure in Poſſeſſion of B. or W. and one of them is carried away by inevitable Inundation or the like, yet I muſt do the other.

This is at Law where no Remedy is given but for the Penalty: But in that Caſe, if the Agreement were without Penalty, and the Penalty for Security, and to be reaſonably intended ſo to be, there tho' an Impoſſibility

of one happen by the Act of God, the Chancery will paſs by the penal and formal Part, and inſiſt on that which was the principal Thing ſecured by the Penalty: If the Penalty were the Principal, it were demandable in Equity.

Now in this particular Caſe, as the Circumſtances of it fall out, Henry Hele who was to make the Jointure, is faln into a Condition as that he cannot perform the one Part, viz. the Penalty; for it is agreed that his Debts exceed the Perſonal Eſtate, and his Land he hath deviſed away, ſo that he cannot morally conſidered, pay the 6000 l. becauſe there is nothing left; the Thing cannot be done by him, ſo he hath no Election to do it being in that Condition.

Object. 2. The ſecond Objection is of more Weight, viz. the Covenant is general, not to ſettle Black Acre of 300 l. Value per Annum, but only to ſettle 300 l. per Annum in Lands, ſo as Henry Hele might ſettle any Lands in thoſe Counties, and the Chancery could never with Juſtice compel him to ſettle this or that Land, if he would ſettle 300 l. per Annum any where within thoſe Counties.

I agree it ſo, as long as he could any Way perform and ſettle 300 l. per Annum; but if he be once reduced to ſuch Condition and Circumſtances, as that he could not poſſibly perform, and ſuch Impotency appear to the Court judicially, the Court may chuſe for him and inforce him to a particular; as if the Time of Settlement were paſt, and he aged or the like, the Court may apply the general on his particular Lands, as if he were an Unthrift, &c.

Object. 3. But here the Land is in Richard the Defendant as a Purchaſer, not as Heir, for he comes to the Land by the Will of Henry Hele, not as Heir to him: Tho' Henry was bound, and his Heir would have been bound had the Lands deſcended to him as Heir: Yet alſo in that Caſe if Richard had aliened the Land before Debt brought on the Bond, the Heir of Henry the Obligor ſhould not have been bound, and by no Rule of Law or Precedent of the Court is an Aſſignee of Land bound by a Perſonal Covenant, and the Court will not make new Precedents.

Resp. The Strength of this Objection lieth in this, viz. That the Agreement is not to settle any Lands in particular, as Black Acre, but generally any Lands in Devonshire, Cornwall, &c. So as it is true, no Lands of Henry were tyed by this Agreement; and therefore how can any of them be bound in the Hands of his Devisee?

Examine why is Henry and his Devisee bound, in Case the Agreement had been of Lands in particular, and Richard Devisee of them. It is clear, Richard should have been bound in that Case, and so should a Purchaser of them if he had Notice; yet in that Case the Land is not bound by the particular Covenant, no more than if it were general, else every Alienee though for a valuable Consideration and without Notice, should be bound, but are not.

So that the particular Covenant doth bind the Covenantor in Conscience, and the Covenant general doth bind him as well and as much.

This Case is now reduced to that Plight, that Henry who made this general Covenant had no Means possibly to perform the general at the Time when he made the Devise of the Lands now in Question, but out of these Lands, for he had no Personal Estate, either to satisfy in Money, or to procure or purchase other Lands of the Value. He makes his Will, he is on his Death-bed, shall the Court imagine that he being obliged on so great Consideration of 3000 l. received by him in Monies, and Security for the Rest, and having no other Means possible but by those Lands to perform his Covenant, and that to his Wife whom he had lately married, and never offended him, to give his Lands to a Brother's Son, and break his Bond and Conscience, and ruin and beggar such a Wife?

I say, that being he had no other Means but by these Lands to perform his Covenant, the Court shall do what in Conscience he ought to have done, and lay Hands on these Lands, seeing that there is left no other Possibility.

Had Henry Hele been alive, he should be decreed in such Circumstance to settle these Lands, viz. 300 l. per Ann. out of them; as the Court, if he had been brought to a Hearing, would not have given him Time to purchase other

Lands, ſo the Court at leaſt would lay hold on theſe, if in convenient Time, or during Life he did not, which differs a Deviſee from the Heir; had he left them to Richard who was his Heir, he had been bound, he leaves them by his Will to him, it is the ſame in Effect.

Object. The Common Law binds not the Deviſee, and it is a Breach of Law to bind the Alienee, and there is no Precedent, it will be a new one.

Reſp. Is it not againſt Law, or to ſay better, is it not more than the Common Law can do, to decree it, if the Agreement were for particular Lands? And yet at this Day there would be no Scruple in that Caſe: The Objection of the Law is as ſtrong in the one Caſe as the other; in both the ſame.

4 & 5 M. There the Covenant was by Indenture to ſettle divers Lands (per noſme:) It is there reſolved, not only that the Eſtate was not ſettled in Law, but alſo Cui nul Subpœma voile giſer pur luy come pur Ceſtuy que uſe de compeller l'Eſtate d'eſtre execute quia party ad Election al Common Ley per action de Covenant, In that and this Caſe.

Obſerv. 1. No Difference where the Covenant is by Name, and where generally at the Common Law.

2. That ſurely 4 M. there was no Precedent then where the Agreement was per noſme.

3. That yet it is indubitable at this Day to decree of particular.

4. That therefore when it was firſt done after 5 Mary, the Court did not forbear to decree, tho' no Precedent.

5. Nay, yet the Court hath gone further to the Heir than to the Aſſignee, tho' a Purchaſer on valuable Conſideration if he had Notice, and it is no Defence for him to ſay, that the Covenantee had Election to ſue by Covenant at Common Law.

It is harder on the Plaintiff, for ſhe hath no Remedy: Indeed ſhe may ſue, but to no Purpoſe, for Richard the Deviſee and Executor tells us and your Lordſhip by his Anſwer, viz. That he hath no Aſſets.

The Common Law relieves not particular Caſes againſt the general Rule, but in Chancery every particular Caſe ſtands on its own particular Circumſtances; and tho' in general the Law will not relieve, yet Equity doth, ſo as the Example introduce not a general Miſchief.

Common Law relieves not againſt a general Rule, but Chancery does. See 1 Chan. C. 158, 177, 201, 205, 228, 84, 284. Poſt 213, 217, 225.

Here is a Cauſe of as great Equity, of as good Conſideration (Marriage and Portions) as can be, as ſingular in Circumſtance, where the whole Eſtate the Defendant hath comes to him by meer Liberality. 1. The Liberality of him who was not pro arbitrio to make the Jointure, but ex juſtitiæ merito.

This Caſe is not like to be a Precedent.

Company of Stationers. 29 April. Ante.

THE King granted the ſole Printing of Engliſh Bibles and Statute-Books to the Plaintiff: The Defendant traded with certain Dutchmen, who printed many Thouſands of them in Holland, and the ſame were now in the Cuſtom-houſe; and formerly on a Bill exhibited in Chancery, the Plaintiff had an Injunction againſt the Defendant not to import or vend the ſame Books, in Regard it was not only a Breach of the King's Prerogative, but of great and publick Conſequence for Strangers to print and vend in England our Statutes and Laws, if falſly done. And now I moved for Explanation of the Order, &c. and Injunction; for the Defendant had acknowledged Judgment, or Judgments were obtained againſt him, and alſo a Commiſſion of Bankrupt was proſecuting, and there was Pretence that thoſe who came in by ſuch Judgment or Commiſſion, ſhould not be bound by the Injunction.

Printing. Injunction. Prerogative. Statute. Vide ante 66, 68, & 76. Poſt 165, 204. 1 Chan. C. 75, 80.

The Lord Chancellor declared they ſhould be bound; and further ordered, that in Regard divers of the Books were in the Hands of the Cuſtomers, the Cuſtomers ſhould ſuffer none of them to be remov'd thence: And that they firſt acquaint the Court, and an Injunction granted accordingly.

Row

S. C. 2 Chan. Rep. 214.

Row *contra* Tillier.

Portion.

THE Father ſeiſed in Fee of Copyhold Lands, ſurrendred them by the Hands of two Tenants, viz. J. S. and his own Brother Tillier, Father of the Defendant, and now dead, to the Uſe of his Brother Tillier and his Heirs, on Condition that Tillier paid to Katherine, the only Child of the Survivor, when ſhe comes to the Age of twenty-one, 200 l. Provided if his Daughter died without Heirs of her Body, then Tillier the Brother ſhould have the 200 l. The Father Survivor died, leaving his Daughter an Infant not two Years old. The Daughter at eighteen Years married the Plaintiff, and had Iſſue George, and died when ſhe was twenty Years and an Half. The Son died an Infant; the Plaintiff Husband of Katherine, the Daughter, and Father of the Child, takes Adminiſtration to them both, and ſueth the Son and Heir of the Ceſtuy a que; the Surrender was made for the 200 l. who inſiſts that the Money is not due, becauſe the Daughter never came to Twenty-one, according to the Condition. Paſch. 1682. The 200 l. decreed to the Plaintiff.

Copyhold ſurrendred on Condition. Vide poſt 150, 151, 174.
1 Chan. C. 171, 243.

The Father gave his Perſonal Eſtate of good Value to his ſaid Brother, but nothing elſe of his own to his ſaid only Child.

Harding *contra* Edge. 13 May.

Charitable Uſes. Decree. Alienee. Ante 18, 32. 1 Chan. C. 135, 158, 267, 193, &c.

A Decree was made by Commiſſioners on the Statute of 43 Eliz. for Charity, againſt Harding; who took Exception againſt it in Chancery, and then being ſeiſed of Lands, conveyed them to raiſe Portions for his Children after the Commiſſioners Decree was confirmed in Chancery, the Conveyance was with Power of Revocation: This ſhall not hinder Execution for the Money decreed, but the Lands alienedſhall be ſequeſtred for the Money, and a Scire facias againſt Harding's Heir; for the Exceptant died after the Decree confirmed; the Conveyance was mean between the two Decrees.

Brooks *contra* Bradley. 11 May 1682.

African Company. Vide ante 6, 7, 11, 12, 36, 37, &c. 1 Vern. 121.

THE Bill was to have a Diſcovery of Gold, and a great Quantity of Goods which the Defendant took out of the Plaintiff's Ship; which Goods and Ship the Defendant took on the Sea.

The Defendant ſets forth, The Charter made by the King to the African Company, of the ſole Trade in thoſe Parts on the Guinney Coaſt, and impowering them to ſeiſe the Ships and Goods of any that ſhould trade in thoſe Parts; and juſtified under the Patent what he did, and denied to make any Diſcovery.

The Plaintiff's Counſel offering to wave the Plea and Demurrer:

Lord Chancellor. If you can help your ſelves at Law, do ſo, but I will give you no Aſſiſtance to diſcover here in Prejudice of the King's Charter.

Pamplin *contra* Green. 11 May 1682.

Diſtribution. Juriſdiction Eccleſiaſtical. Stat. 27 Car. 2. Poſt 229.

THE Bill is againſt an Adminiſtrator and other Perſons, to have Diſtribution of the Inteſtate's Eſtate, according to the late Statute; which Statute the Defendant pleaded, and that by that Statute the Ordinary is made the Judge to diſtribute, and is appointed to take Security: And therefore the Plaintiff ought to ſue there, and not here.

The Lord Chancellor over-ruled the Plea, and ordered, that the Defendants ſhould anſwer.

Sir Charles Lee *& Uxor contra Sir* John Boles, *Adminiſtrator to his deceaſed Wife.* 1682.

THE Defendant had Verdict and Judgment againſt the now Plaintiffs, who now after the Judgment ſought to be relieved againſt the Judgment, and the Caſe on hearing was, viz. The ſaid Sir John Boles became a Suitor to the Plaintiff's Daughter, who was informed that his Eſtate in Lands was 1700 l. per Annum, and free from

from all Incumbrances, except 7000 l. for a Daughter's Portion, to his Daughter by a former Wife, then sick. The Mother the Lady Lee informed him, that her Daughter's Portion, left her by her Father deceased, was 2000 l. but she would add 2000 l. more, and so pay the said Boles 4000 l. and would give her Daughter 1000 l. more, and 60 l. per Annum for two Years, if his Estate was such; and Articles were mutually executed, by which it was in the Head, and other Places of the Articles, recited and expressed, that the Daughter's Portion was 4000 l. but there was a distinct Article, that if no Act were done or suffered before the first of November 1668. whereby the Heir Male of Sir John Boles by the Plaintiff's Daughter, might be hindered from enjoying the Lands by the Articles agreed to be settled on them, then the Mother would pay to Sir Vincent Corbet and Robert Corbet, 1000 l. and 60 l. per Annum, for two Years for the sole and proper Use of her Daughter, and Sir John Boles not to meddle with it: There were other Articles for Jointure, &c. and Settlement on the Heirs Males; but the Lady finding that the Lands were incumbred, would not suffer the Marriage to proceed. Thereupon Boles and the young Daughter agreed with the Mother to release the 1000 l. and did make a full Release and Discharge thereof, referring to the Articles touching the Payment thereof: But this, though in Writing, and subscribed by Sir John Boles and the Daughter, was not sealed; the Daughter was of full Age; the Marriage was had, but the Lands were incumbred; 2000 l. of the Portion being unpaid, a Suit was in Chancery; which by Mediation of the Court was composed, the 2000 l. paid, Lands of 1200 l. per Ann. settled, and so all Things quiet: But the Wife being dead, Sir John Boles takes Administration, and sues Sir Charles Lee and his Lady for the 1000 l. in an Action of Covenant, whereon the said Release (not being under Seal) could not be pleaded; but the 1000 l. not being payable by the Articles unless the Land was free, ut supra; and finding a Mortgage made by the Father of Sir John Boles, that incumbred the Lands, and that Sir John Boles always received the Profits thereof, which gave Occasion to the Plaintiff's Heir to believe those Lands to be Sir John Boles's, and they by Way of bar to the Covenant; that Matter was pleaded, viz. that those Lands were incumbred, and shewed how: But it being insisted then that the said Lands were not the Lands of

Release sign'd but not sealed.

Verdict.

Mistake.

Sir John Boles in Law or Equity, the Mortgage being unsatisfied, for they were the Mortgagee's Lands in Law and Equity till he was paid, and so the Article in Generality comprehended not those Lands.

The Verdict past for the then Plaintiff, and the Note was given in Evidence to the Jury in Mitigation of Damages: Therefore the Defendant insisted, that after Verdict and Judgment in an Action of Covenant, wherein Damages are only recovered, the Suit is not to be allowed in this Court.

A Gift on a Condition precedent and unperformed, &c.

1st. For the now Plaintiff it was prefsed, that this 1000 l. was a voluntary Gift and Liberality of the Mother, and given and covenanted to be paid only on precedent Condition, viz. if no Incumbrance (that might prejudice the Heir Male) were, but now the Lands appeared to be incumbred.

Tho' nudum pactum and void in Law, yet good in Equity.

2dly. Though in Strictnefs of Law an Agreement to discharge a Duty created under Hand and Seal, is not good in Law; yet in natural Justice it is all one as to the Conscience of the Parties, where there is no Fraud or Practice, nor Surprize in obtaining it, much more when there is a Consideration or just Reason for it, as here there was, viz. consenting to the Proceeding of the Marriage, which was justly stopt by the Lady, being informed of the Incumbrance. And it is adjudged at Law, that in Consideration the Father or the Mother shall consent to the Marriage of a Child, it is good to raise a Use or Action on the Case.

The Reason of Sealing, &c.

3dly. The Reason why the Law requires a Seal and Solemnity is, that the Thing be certi juris, and to prevent Surprize, of which here is no Doubt. The Defendant confesseth the Fact, though he swears also that he meant not to abide by it, or to that Effect, so the Fraud lies on his Side; he meant not to do in Effect what he did in Shew do.

Verdict on a Mistake.

4thly. The Verdict was on a Mistake, whereinto the Plaintiff was led by the Defendant, for he kept Possession, and received the Rents, &c. which made the Plaintiff take him for Owner of the Land; and the Plaintiff now, then Defendant, could at Law assign but one Breach, viz. one Incumbrance, though there were many, and are now proved; and if any Incumbrance were, he had no Title to the 1000 l. and it is no Reason that the Strictnefs of the Law

tying the Plaintiff to one Breach, should intitle the now Defendant to that to which now it appears he never had Title, because there were more Incumbrances; so in Truth he never had Title.

The Lord Chancellor after long Debate dismiss the Bill, principally because the Plaintiff did not come into the Court till after the Verdict and Judgment: And the Chancellor took Notice that the Settlement made was more beneficial than the Settlement propounded in the Articles; but that was ordered after the Condition broken, viz. not discharging the Incumbrance six Years after the Time when, &c.

S. C. 1 Vern. 41.

Rauson *contra* Sacheverel. 13 May.

Pay all.
Feme Covert.
Mortgage.
Surcharge.
Ante 23, 35, 87.
Hard. 318.
1 Vern. 37, 41.
Post 164.

Sacheverel and his Wife, seised in Right of the Wife, by Fine and Deed mortgaged them for 340 l. which was not paid at the Day, but 200 l. Part was paid afterward, and then the Mortgagor had Occasion to borrow, and did borrow other Money of the same Mortgagee. The first Money, viz. the Payment of the 200 l. was indorsed on the Mortgage-deed; the Wife in Presence of the Husband made Account of what was due on the first and second Loan; for both by Agreement were to be on Security of the Mortgage: The Wife died, but no new Fine levied on the second Loan.

And therefore it is objected, that neither her nor the Husband's Consent shall bind her Heir.

The Lord Chancellor econtra: For the Mortgagee hath good Title in Law, and as much Equity to the Money as the Heir hath to the Land, pour que, &c.

Brond *contra* Brond. 19 May.

Jointress redeems, &c. paying a third Part.
Mortgage.
Baron and Feme.
Limitation.
Ante 19, 53, 87, &c.

Thomas Brond late Husband of the Plaintiff, in Consideration of 3000 l. settled, inter alia, Houses in Bread-street, in all of the Value of 350 l. per Annum, to the Use of himself for Life, Remainder to the Plaintiff for Life for her Jointure, with Remainder over. The Houses Anno

1666. were burnt, and the Husband being unable to rebuild them, without borrowing Money, perswaded the Plaintiff to join with him in a Fine sur concessit, for a long Term of Years, to secure the Money to be borrowed; and agreed with the Plaintiff that it should be no Prejudice to her, but that she should redeem, paying the Interest of the Money borrowed. 600 l. was borrowed of Alderman Jefferies, and a Fine levied to him for 99 Years by the Plaintiff and her Husband. Jefferies redemised the Tofts of the burnt Houses to the Husband for 98 Years, rendring 36 l. per Ann. and to repay the 600 l. at a Time, &c. the Houses are rebuilt by the Husband, who afterwards settles them and other his Lands on himself in Tail, to the Heirs Males of his Body, the Remainder in Tail to the Defendant his Brother, charged with Portions of 3000 l. to his Daughters, and dieth Anno 1674. and made the Defendant his Executor, being his Brother, his Personal Estate but 182 l. short of his Debts. The Defendant was bound for him in Bonds to the Value of 1600 l. and entred on the Houses, paid the 1600 l. and took up the Bonds, and also paid the Interest of the 600 l. borrowed till 1681. and then the Plaintiff exhibited the Bill to redeem, for that the Houses yield 180 l. per Ann. and the Rents received by the Defendant were more than the Money borrowed, and her Jointure now left but 200 l. per Ann. besides the Houses; and prays that she may redeem, paying proportionably, and hold over till that she be repaid, with Interest.

Econtra, It was alledged, and the Truth was that she never questioned the Matter in thirteen Years, during all which Time the Defendant paid Interest, and paid the 1600 l. which was the Brother's Debt, and the Houses redemised, came to him as Executor of his Brother, and were Assets in his Hands; so that in Law the same was liable to pay Debts; and in Equity he ought not to be liable to his Brother's Debts; and the Plaintiff's Title was but a Parol Agreement between Husband and Wife, and the Defendant never had Notice of any such Agreement till this Bill exhibited Anno 1681.

The Plaintiff's Counsel replied, That when she joined in the Fine with her Husband, the Equity of the Redemption did properly belong to her, and her Husband could not discharge it by any subsequent Act or Agreement be-

yond the Mortgage-money and Interest, unless it were for valuable Considerations to one who had no Notice of her Title; but the Defendant is no Purchasor, but comes in only as Executor, and paid no Money for the Lease: Therefore prayed that she might be admitted to redeem from the Mortgagee, that the Profits and Rents which the Defendant had received ultra the Interest might be accounted to her as belonging to her for her Jointure.

Q. 1 Vern. 294. Post 148, 9.

The Lord Chancellor after much Debate decreed, That she should have the Redemption, paying a third Part of the Principal Money, but should have no Profits received by the Defendant, till the Bill exhibited 1681. which was the first Time he had Notice of the Agreement. And the Defendant was to pay the other two Parts of the Principal, and the Executrix the Wife to be reimbursed in Case she died, if she paid more than the third Part. The Mortgagee was Party to the Bill.

Hammond *contra* Shelley.

Commission to examine Contempt sworn, but Process mis-served.

THE Defendant was decreed to pay the Plaintiff 400 l. and being examined for Non-payment, denied the Service of the Process; and the Parties living in Plimouth, the Plaintiff had a Commission to prove the Contempt, and proved it positively by one Witness. The Defendant prayed a Commission to examine touching the Contempt, alledging to the Court that the Truth was, That the Defendant was never served, but sick in her Bed at the Time when the Service was pretended to be made; and that her Sister going to the Door when he that served the Process knocked, he served her instead of the Defendant.

The Plaintiff much opposed this Commission, but my Lord Chancellor granted the Motion, for it was not known whether it was served, but whether it was mis-served; and said it was no Reason she should lose her Liberty upon a Mistake of serving Process.

Paget *contra* Paget, &c.

THomas Lord Paget deceased, having several Sons, whereof the Plaintiff was one, he by good Assurance appointed inter alia, 12000 l. to be for Portions of the younger Sons; the Plaintiff's Proportion thereof came to 2000 l. or thereabouts; but he became indebted and had spent 400 l. which he desired one of the Defendants, the now Lord Paget, to pay him out of his Portion, which was in the Defendant's Hands, and to relieve him he was contented to do, so as out of the Rest Provision might be made for his Wife and Children, to be laid out in Lands; for it was feared that he might waste the Rest: And Articles were entred into accordingly that the Rest should be so laid out; but the Plaintiff being further indebted, he sues to have some further Proportion, for he might better provide for himself and Family if he might be supplied with 500 l. to buy an Office, and 100 l. to pay his Debts.

Wife's Money decreed to buy the Husband an Office, &c.
Q. 1 Chan. C. 41, 189.
Vide post 144.

The Lord Paget submitted to the Judgment of the Court, and was willing to pay the Money into Court, or as the Court should order.

The Lord Chancellor propounded often to the Defendant's Counsel, what Sum should be paid.

They said they might not consent: The Articles were that it must be laid out in Land; and the Wife was concerned, and no Party to the Bill. The Wife happened to be in Court, and said she desired the Money might be laid out as her Husband had prayed; and being examined by the Lord Chancellor, answered accordingly.

Chancery.
Feme Covert examined.
Consent, &c.
Ante 39.
Post 173.

Whereupon the Lord Chancellor decreed that 600 l. should be paid, viz. 100 l. to pay Debts, and 500 l. to be laid out to buy an Office, but not to be paid to the Plaintiff himself, but for an Office; and in the mean Time the Lord Paget to pay the Interest, for he did offer to pay the Whole into Court, or keep it at Interest. And it was further ordered that the Plaintiff should procure the Office within Months.

Quære, If the Office be bought, and the Husband die; quid.

Mildmay.

S. C. 1 Vern. 53.

Mildmay *contra* Mildmay, &c.

Conveyance in Trust by the Husband for his Wife.
Baron and Feme.
Agreement.
Elopement.
Vide 1 Ch. C. 250.
Ante 15, 17.

THE Plaintiff, Wife to the Defendant, and Coward her Trustee, sue to have Performance of an Agreement made under Hand and Seal; by which the Defendant granted to Coward, whose Executor the Plaintiff Coward is, all his Rents of his Manor of East-Camel in the County of Somerset, Habendum for Years, if the Wife lived so long, for the sole Use of the Wife; and if the Rents failed by the Death of Tenants, whereby the Lands might decay, he would continue Payment, and enforced her Demand, because the Ecclesiastical Court had given her Alimony, but less than they would have otherwise given her in Respect of this Grant; and for further Equity, that the Defendant had bought in some of the Tenants Estates, whereby the Rents could not be recovered at Law.

The Objections were:

1st. That the Grant was after Marriage, and voluntary; for her Portion being 1200 l. she had on Marriage a Jointure of 100 l. per Annum settled; and the Grant in Question was made two Years after, and the Rent was duly paid 'till she undutifully eloped from him, as he deposes in his Answer.

2dly. The Case of it self is not a Case for this Court to favour; and to decree for the Wife against the Husband, is to give her Power over her Husband, or his Estate, by a voluntary Agreement of the Husband.

The Lord Chancellor decreed that the Plaintiff shall not be barred to sue in her Trustee's Name: And that the Surrender or Discharge of the Rent by the Husband, shall not be made Use of.

White *contra* Small.

Conveyance voluntary made by a Perſon weak, tho' no Lunatick, avoided. 1 Cha. C. 100, &c.

DEcree that Conveyances, made to the Defendant by Elizabeth Marchant of an Equity of Redemption, be ſet aſide; the Bill being grounded on Weakneſs and Lunacy of Elizabeth, the Plaintiff's Couſin-german, and heir to Elizabeth; the Defendant Couſin-german, in the ſame Degree. No Proof of Lunacy; but ſhe was weak of Underſtanding, ſhe could read, and taught a Child to read: Two Days after the Deed, ſhe ſaid ſhe had made it to the End the Defendant ſhould have the Land; yet becauſe the former Communication of ſuch Grant was before, and no Conſideration in the Deed, but fraudulently prepared and obtruded on Elizabeth, it was ſet aſide by the Lord Chancellor.

Where voluntary Conveyances are to be held fraudulent, or not, ſee 1 Chan. C. 100, 133, 4, 216, 245, 289, &c. Ante 4, 69. Poſt 120, 133, 134, 137, 151.

DE

DE
Term. Sanct. Trin.
Anno Regis 34 Car. II.
IN
CANCELLARIA.

S. C. 1 Vern. 160.
1 Chan. C. 21, 29.
2 Cha. R. 245.

Jointure.
Sequestration.

Domina Dacres *contra* Chall. Chute. 15 June 1682.

CHall. Chute, Grandfather to the Defendant, and Husband to the Plaintiff, by Deed covenanted to settle on the Plaintiff a Jointure of 500 l. per Annum, or to leave her 5000 l. He fail'd to make the Jointure, and died: The Plaintiff obtained formerly a Decree for the 5000 l. with Damages, against Chall. Chute, Father of the Defendant, who dying, the Bill was revived against the Defendant as Heir to his Father and Grandfather, and against Mr. Barker and Mr. Leonard, his Uncles and Guardians. There was so far Proceedings against Chall. Chute the Father, that a Sequestration of the Vine and other Lands was ordered, and Owen and three other Sequestrators were named. The Cause coming to be heard against the Defendants, the Bill being for the 5000 l. Damages;

The Counsel for Chall. Chute, then Defendant, informed the Court that there were many Debts on the Estate; and two younger Sons and a Daughter of the Defendant's Father, that had no Maintenance, a Statute of 3000 l. to the Lady Anglesey, acknowledged by the Defendant's Father for Payment of 400 l. per Annum, to the Lady Anglesey for her Life; and if the Lady Anglesey should lay hold on the Personal Estate, the Family would be ruined, the younger Children unprovided for, the Debts insupera-

 ble,

ble, and therefore the Defendant's Counsel propounded for Remedy that the Plaintiff the Lady Dacres should not lay on the Sequestration on the whole Lands, but suffer the Lady Angleſey to enjoy Part; for though her Statute bound the Defendant, (being acknowledged by him) yet it was subsequent to the Plaintiff's Demand, grounded on the Grandfathers's Covenant, and some other Things, and propounded that 40 l. apiece might be paid for the young Children; and after Debts paid, and these Things done, the Defendant should have the Surplus. Mr. Barker and Leonard, the Guardians of the Defendant, and the Plaintiff not opposing, it is so decreed, and Mr. Owen (which was Part of the Proposal) to receive and dispose of all, and 20 l. per Ann. Sallary to be allow'd to him, and accordingly the Court decreed it. The Childrens Maintenance was raised and disposed of by Owen, as well as the other Matters and Payments to the Plaintiff, towards her Satisfaction of her 5000 l. with Damages: Owen to take Administration of the Personal Estate, and apply the same to the other Debts, which he did: And the Maintenances of the three young Children, amounting to 120 l. per Annum, was by Owen paid, some Part to the Childrens own hands, and the Rest to the Plaintiff for them, who educated them therewith, paid for their Schooling, Clothing, &c. and brought them up very well; and Owen accounted still to Mr. Barker of those and the other Payments. Mr. Barker subscribed and allowed the Accounts, and so Matters continued and were transacted for many Years, viz. about twelve Years.

And then Chall. Chute the Grandchild appealed to the Lords in Parliament against the Decree; and among other Points, insisted that he ought not to have been charged with the Maintenance of 40 l. per Annum, to his younger Brothers and Sisters. And as to that Point the Lords in Parliament adjudged, that the Clause in the said Decree touching the Maintenance of the young Children be reversed and annulled; inter alia, they confirm the first Decree made for the Lady's 5000 l. with Damages. They order, &c. that the Plaintiff account for what hath been received by her.

Afterwards the Plaintiff exhibits this Bill, for that Chall. Chute the Father had made a Will, which was in Mr. Barker's Hand and concealed; wherein he made Barker and Leonard the Uncles, Guardians to all his Chil-

dren, and his Executors; and as she alledged, he had provided for Maintenance for the younger Children thereby, and therefore she ought not to be charged with the Maintenances; for the Defendant pretended that the Monies received by her from Owen out of his Estate, ought to be charged on her Account, and to sink her principal Debt, with proportionable Damages from Time to Time: And on this depended the Resolution of an Exception to the Master's Report, who stated the Account as to this Matter, especially touching that Point.

Now the Will was read as before, but tho' the Uncles were made thereby Guardians and Executors, nothing could be thence enforc'd to the Point of the Maintenances.

The Point debated before the Lord Chancellor was, Whether the Plaintiff should be charged with the Money receiv'd by her from Owen for the Childrens Maintenance, amounting to 1200 l. which with Interest came to 2000 l. or thereabouts?

The Defendant's Counsel now insisted that she should;

1st. For she was their Grandmother, (which was true, for Chall. Chute their Father, married her Daughter their Mother) and therefore she by Law ought to have maintained them.

2dly. It was her Agent that received the Monies, and paid the same to her.

3dly. The Lord's Order is express, that she is to account for what she received; but this Maintenance-money was received by her.

The Plaintiff's Counsel answered;

1st. She is not bound to maintain her Grandchildren more than the Defendant is to maintain his Brothers, and no Law binds her to it.

2dly. Owen is not her Agent, but the Agent of the Court, and of the Creditors, and of the Defendant: He is appointed Receiver for all Persons, and that by the Court, and this done at the Proposal of the Defendant for his Benefit, and to preserve him and his Family; for the Plaintiff suffered Prejudice by it, viz. Delay in Payment of her 5000 l. for Satisfaction whereof she had a Sequestration. And,

3dly. The Order of the Lords, that she should account for what she received, must be intended of so much as she received to her own Use, but not of what was paid to her only for the Children.

Owen received for the Children, and paid it all for them, and much into their own Hands, and it is not more just to charge the Lady than Owen with it: And the Receipt and Employment of the Money was by Virtue of, and in Obedience to a Decree of the Court while it was in Force, which Decree was at the Defendant's Motion by his Counsel, and for his Advantage, not the Plaintiff's; and after the Decree the Plaintiff nor Owen could not avoid Obedience to it, and no Man must suffer for his Obedience; and if the Court erred in this, they ought to make Restitution who receiv'd the Benefit of that Error, viz. either the younger Children who enjoyed it, or the Defendant, whose Counsel moved it, and procured it for the Benefit of the Defendant, and his Uncle and Guardians were Parties to the Suit, and were present in Court, and consented to the Decree as much as the Plaintiffs, viz. she nor they did not oppose it. And more; for it cannot be conceived that the Infant Children made the Proposition to the Court, but rather Barker and Leonard, Guardians; and if it had been for the Disadvantage of the Defendant, to whom they were Guardians, their Duty was to have opposed it: And when an erroneous Decree is made in Behalf of any one, and an Agent appointed to manage it for such Person, and it be done, when such Decree comes to be reverst, Restitution must be from that Person for whose Benefit the Decree was, and not from the Agent.

The Lord Chancellor in the Debate seemed very inclinable to relieve the Lady; for he declared that the Lady as Grandmother was not bound to maintain the Grandchildren, but as Justice should order, &c. frequently prest the Defendant, whether he would not at least do something for his Brothers, &c. Declared at last he saw no Equity nor Ground to charge the Lady, &c. and the Decree, while unreverst, was to be obeyed: And as this Case was circumstanced, the Court when a Family is to be preserv'd, younger Children kept from being starved and undone, and Care taken by Consent of the Persons and Friends in it, and an Estate able to bear it, if this should be undone; All such

Cares and Providence of the Court would be loſt, and thoſe already made, reverſt, which would be inconvenient: But he ſaid I am to obey the Order which limits me; and ſo as to this Part relieved not the Plaintiff.

Dyer *contra* Dyer. 17 June 1682.

Purchaſer. Incouragement by one who had Title. Ignorance. Poſtea 128. Hobbs contra Norton. Ante 43, 68. 1 Chan. C. 37, 247.

THE Defendant's Father granted to J. D. a Rent-charge of 100 l. out of certain Lands mentioned in the Bill under Power of Revocation. The Plaintiff treated with J. D. to purchaſe the Rent, which the Defendant for twelve Years continually paid to J. D. The Plaintiff informed the Defendant that he was in Treaty to purchaſe the Rent, and inquired of the Defendant whether ſuch Grant was made, and whether it had been ſo paid, and whether it were revoked or not, and the Bill chargeth it ſo: And that the Defendant confeſſeth the Grant and Payment, and that it was not revoked to his Knowledge. Thereupon the Plaintiff purchaſed the Annuity for 2000 l. All this the Defendant in his Anſwer confeſſed: But whereas the Plaintiff in this Bill charged alſo that the Defendant promiſed Payment, he denieth any Promiſe. The Cauſe was brought to Hearing on Bill and Anſwer.

And Mr. Solicitor, the Plaintiff's Counſel, preſt for a Decree.

The Attorney General moved that the Cauſe might be put off till a Croſs Cauſe might be brought in, which would be ready, &c. Which Cauſe was to diſcover Settlements made by the Grandfather on Marriage, by which the Defendant's Father could not make ſuch Grant: Which Settlements were concealed, and kept from the Defendant.

Mr. Solicitor. Be your Title what it will, it will not hurt the Plaintiff, who acquainted you with his Intent to purchaſe, and you confeſs Payment, &c. ſo you have thereby encouraged and drawn us into the Purchaſe, and we have paid fully for it.

Ignorance of a Man's Title ſhall not prejudice it. Poſt 128. And Miſtakes may be amended. Ante 43. 1 Chan. C. 3, 9.

Attorney General. We told you nothing but the Truth, and were ignorant then of our own Title; our Ignorance muſt not prejudice us; if we had miſinformed you, or having a Title and knowing it, concealed it, that might alter the Caſe.

Lord Chancellor. Ignorance of his Title differs the Case, therefore put off the Hearing; &c.

Booth *contra* Booth.

THE Uncle by Lease and Release settled the Lands in Question to the Use of himself for Life, Remainder to Humphrey the Plaintiff for Life, Remainder to his Sons, first, second, third, and fourth in Tail; the Remainder to the Defendant for Life, Remainder to his first, second, &c. Sons, with Power of Revocation, and a Proviso if Humphrey marry without Consent of the Uncle during his Life, and after his Death, of A. B. &c. then the Uses limited to Humphrey and to his Sons to cease, and then to the Use of the Defendant. He married without Consent, having no Notice of the Conveyance or Proviso: But his Uncle (who knew not of the Marriage) entertained him kindly, and gave Legacies to him by his Will, and died. The Defendant disturbs the Plaintiff because of the Forfeiture, and dismist to Law.

Forfeiture. Notice. Trust and Estate, their Difference. See 1 Chan. C. 22, 138. 1 Vern. 20. 2 Chan. R. 23, 26, 95. 1 Mod. 300. M. 47.

But the Chancellor ask'd if it were a Limitation of a Trust, or of an Use?

Trust or Use, Q. 1 Chan. C. 114, 115.

Resp. Use. Chancellor, Then it is at Law.

Anonymus. 3 July.

BY a Decree in Chancery, a Will of Lands attested by three Witnesses, who at several Times subscribed their Names at the Request of the Testator, but were not present at once together, is a good Will within the Statute.

Will attested by three Witnesses, though at several Times, good. Vide St. 29 Car. 2.

Anonymus. *The same Day.*

A Man devised his Debts to be paid out of his Real and Personal Estate; the Executor paid more than his Personal Estate, he shall be reimbursed out of the Real Estate.

Debts devised to be paid out of Real and Personal Estate. 1 Chan. C. 249, 299.

Herring

Herring *contra* Walround. *The ſame Day.*

A monſtrous Birth ſhown for Money, a Miſdemeanor.

HErring, Anno 1681. was delivered of two Female Children, they were baptized by the Names of Aquila and Priſcilla: The Birth was Monſtrous, for they had two Heads, four Arms, four Legs, and but one Belly where their two Bodies were conjoined. The Birth was at Ilbrewers in the County of Somerſet: Many People came daily to ſee them, and gave Money to the Parents; the Father was a poor Cottage Tenant to Mr. Walround, a Juſtice of the Peace, who, and the Father entred into Articles, that Walround ſhould have the Cuſtody of the Children, and the Benefit that was to be made by Shewing of them; but was to pay the Plaintiff one Eighth Part of that Benefit, and to maintain the Plaintiff his Wife and Children (for he had other Children) ſo long as Aquila and Priſcilla lived. The Bill complains that the Articles were gotten from the Plaintiff by Surprize, being prepared, &c. but the contrary was proved: The Children lived but a Month, and then after the Bill being exhibited to be relieved againſt the Bond and Articles, and an Account of the Monies received by the Defendant for Showing the Children, which the Defendant had embalmed, and cauſed to be ſtill kept.

20 l. Bonds mutually to perform Articles.

The Chancellor much diſliked theſe Doings, and decreed the Defendant to bury the Children within a Week, and to account for what he or his Agents had received, and full Coſts of the whole Suit to the Plaintiff; who (her Husband the former Plaintiff being dead) did revive the Bill.

Collett *contra* Collett. *The ſame Day.*

Deviſe.

WIlliam Fox Gent. having Iſſue three Daughters, Mary Goodwin Widow, Elizabeth late Wife of Samuel Collett, and Martha late Wife of Cornelius Collett, by his laſt Will dated the 27th of September, 1679. among other Things, deviſeth as followeth:

Residuum to be laid out in Purchases, &c. Q. Post 198.

And as to the Residue and Overplus of his personal Estate, concludes his Will in these Words:

I will that after my Debts which I shall owe at the Time of my Decease, and my Funeral Expences, and the Probate of this my Will be discharged and paid; then I do give all the Rest of my Personal Estate unbequeathed, to purchase an Estate near of as good Value as the same Personal Estate shall amount unto, within one Year next after my Decease: Which said Estate so to be purchased, I will, shall be settled and assured unto and upon my said three Daughters, **Mary, Elizabeth** and **Martha**, and the Heirs of their respective Bodies lawfully begotten, for ever; or otherwise my said Daughter **Mary**, and the Husbands of my said two other Daughters **Elizabeth** and **Martha**, shall for such Monies as they shall receive of my said Executors, for the Overplus of my Personal Estate, to enter into one or more Bonds, of the double Sum of Money as each Part shall amount unto, the same being to be divided into three Parts, unto my said Executors within eighteen Months next after my Decease, to settle and assure such Part or Sum of Monies as each of them shall receive; and by this my Will for the Overplus of my Personal Estate, unto and upon the Child and Children of my said three Daughters, **Mary, Elizabeth** and **Martha**, Part and Part alike.

Martha **the Wife of** Cornelius Collett **died about half a Year after the Testator her Father, leaving Issue a Daughter, which Daughter died about four Months after the Mother: The other two Sisters,** viz. Mary **and** Elizabeth surviving, Cornelius Collett **took Letters of Administration as well of the said** Martha **his Wife, as to his said Daughter.**

No Land or Estate was purchased with the 400 l. **or the Overplus of the Personal Estate given to** Martha.

The Question was, Whether the Plaintiff who was Administrator both to his Wife and Child, was intitled to the third, or any Part of the Residue of the Testator's Estate?

The Lord Chancellor **dismist the Bill, and declared he had no Part therein, not in Right of his Wife, because she died; and by the first Part of the Clause it was to be laid out in Land, to be settled on the three Daughters, and the Heirs of their three Bodies: And by the second Clause** Mary **and the Husbands of** Elizabeth **and** Martha, **are to secure what they receive,** &c. prout.

Nota,

Nota, In the last Case it was moved, that if Land had been purchased and settled to the Wife in Tail, the Plaintiff should have been Tenant by the Courtesy, and therefore should have Recompence; sed non allocatur.

Clayton *contra Duke of* Newcastle. July 1682.

The Heir sells in the Life of the Ancestor, and receives the Money. The Ancestor dieth, the Heir is decreed to convey. Q. 1 Chan. C. 262, 171, 234, 240. Post 120, 137, 236.

THE Earl of Newcastle purchased Clipston in the County of Nottingham, to him and to Sir Charles Cavendish in Fee, in Trust for himself and his Heirs; the Rest of his Manors and Lands by Recoveries and Deeds, he settled in Trustees for himself for Life, and to pay Debts and raise Portions after his Death: And the Wars falling out, he went beyond Sea, in which Time, viz. of his Abode there, the Lord Mansfield his Heir apparent, and Henry his Son, and now Duke acted on the Earl's Behalf, sold Clipston to Wakefield in Fee for a full Consideration, in Trust for William Clayton: The Conveyance was made by the Lord Mansfield and Henry his Son, now Duke, and by Rolleston, who was then the surviving Trustee in the great Settlement aforesaid, but was not estated in Clipston, for that was not comprized in that Settlement; but the legal Estate was in the Earl and Sir Charles Cavendish, and the Purchase-money was duly paid to the Vendors, and Part paid by them for a Daughter's Portion.

Wakefield and William Clayton, for whom J. S. was Trustee, on Treaty of a Marriage to be had, and Portion, covenants to settle Clipston, inter alia, on the Plaintiff himself, with Remainder, &c. to the first, second, &c. Sons in Tail, &c. and a Settlement (tiel quel) made accordingly, and Possession accordingly, enjoyed till 1660. when the Earl returned into England, and entered on the Estate, and divers Suits arise between the Earl and Clayton; they both die, the Lord Mansfield dieth, the now Duke Heir to them both being in Possession: Clayton, Wife of William, sueth to be relieved for Clipston, being made to her in Jointure, but opposed by the now Duke, on two Grounds.

1st. By certain Articles made between the Earl and Clayton, whereby Clayton was to convey Clipston, &c. inter alia, to the Earl; but as to them the Court in a Cause lately heard between the now Duke, then Plaintiff, &c. to have the Articles perfomed, and 6000 l. paid according to those Articles; had set them aside, because they were waved, and new Agreements made, and other Reasons, and the Duke's Bill dismist.

2dly. Because the Persons who contracted with, and conveyed to Wakefield, had no Estate in them, nor were trusted by the Earl to sell; but the Estate in Fee of Clipston was in the Earl himself, and Sir Charles Cavendish in Trust, for the Earl; and Sir Charles Cavendish died, and the Earl surviving, the whole legal Estate did vest in the Earl, and is come by Descent to the now Duke as heir to the Lord Mansfield; and the Earl and he had the legal Estate in Law, and Equity also; whereas Mrs. Clayton the Plaintiff had only Equity with her, (if so much.) And then where Law and Equity is, it will prevail against Equity without Law.

And the Defendants deny that the Earl ever gave any Authority for the Sale of Clipston, or knew of the Sale, or Imployment of that Money; but that during his Exile, he was maintained by his Brother, and that the Earl by his Entry was estated in his first Right, and no Way bound by what was done of others.

Econtra, That the now Duke having taken upon him to convey, and conveyed the Lands by Indenture under his Hand and Seal, as also the Lord Mansfield did; and receiving the Purchase-money, and employed it for the Benefit of the Family, and having now no Title, but as Heir now that he is come to be Owner of the Lands he sold, he shall be bound to make good the Sale, and accordingly the Lord Chancellor decreed it.

In the Hearing of the Cause, Offer was made to read Proofs, to support the Articles, because there was no Decree in the other Cause, but only a Dismission; but the Lord Chancellor did not admit it.

Bullock *contra* Knight. 14 July.

The Case was.

Term not intailed. Truſt to A. and the Iſſue of A. ſo long as Iſſue continued. A. ſells the Term, it is good. See 1 Chan. C. 8, 9, 68, 208, &c. ibid.

William Bullock being poſſeſt of a Leaſe for a thouſand Years, of the Lands in Queſtion, in Conſideration of a Marriage to be had between Henry Bullock, his eldeſt Son, and Bridget Daughter of Sir John Knight, granted the ſame Term to Sir John Knight, &c. in Truſt, that William Bullock ſhould receive the Profits till the Marriage, and after the Marriage to permit Henry Bullock the Son, and his Aſſigns, to hold the Premiſſes, and receive the Profits ſo long of the ſaid Term as he ſhould live, and no longer; and after his Deceaſe and Marriage, ſhould permit the ſaid Bridget and her Aſſigns, to hold and enjoy the Premiſſes, and receive the Profits ſo long of the ſaid Term as ſhe ſhould live, and no longer; and after the ſaid Marriage, and Deceaſe of the Survivor, the ſaid Henry and Bridget ſhould permit the Premiſſes to be enjoyed as followeth, but not otherwiſe, or in any other Manner: viz. By the Iſſues of the Bodies of the ſaid Henry and Bridget, between them to be begotten, for and during ſo long Time of the ſaid Term as ſuch Iſſue ſhould have a Being, and continue in rerum natura, to take and enjoy in like Manner, as Heirs in Special Tail by Courſe of Diſcent to hold and enjoy; and for Default of ſuch Iſſue, ſhould permit the ſaid Henry, his Executors, &c. to enjoy the Premiſſes, and receive the Profits to the End of the Term. Henry and Bridget had Iſſue, Henry and John, who died both without Iſſue in the Life of Henry the Father. Henry the Father aſſigns to William all his Intereſt which belonged to him, to William Bullock, Habendum after the Death of himſelf and of Bridget, and of the Children of Henry and Bridget, and dies: Bridget ſurvives him; Sir John Knight takes Adminiſtration to Henry, the Son of Henry, Bridget takes Adminiſtration to John the Son of Henry; Sir John Knight aſſigns to Bridget, Bridget aſſigns to Anne the Defendant; upon whoſe Plea and the Bill, all this Matter appears: John Bullock the Plaintiff claims by the ſaid Deed of William Bullock, and his Executors.

The Lord Chancellor took Time to advise, and now, the 14th of July, 1682. heard Counsel again, and declared that the Limitation to the Issue, ut supra, vested the Estate in Henry and Bridget, and not in the Issue: And Anne had a good Title, and allowed the Plea.

Culpepper *contra* Aston: *Et econtra.*

SIR Thomas Culpepper, Father of the Plaintiff, seised in Fee of Lands in Plumpsted, &c. by his last Will in Writing devised, (viz.) I give to my Daughter Ruperta 1000 l. to be paid at her Age of 18 Years or Marriage, and to be levied out of all those Sums of Money due from his Majesty for the Wardships of Phillips, &c. and the Residue thereof to my Son Thomas, and that for Payment of his Debts, his Lands in Plumpsted, &c. shall be sold by my Executors; and my Meaning is, that if all my Debts, and the said 1000 l. may be raised as aforesaid, or out of the Rents and Profits of my Lands, Tenements and Hereditaments, then my Lands in Plumpsted, &c. shall be conveyed to my Son Thomas and his Heirs. And three or four Days after, the 9th of March, 1642. by Lease and Release, conveys the Lands in Plumpsted, &c. to Sir Nicholas Crispe and Henry Culpepper, to pay his Debts: Sir Thomas Culpepper died: Thomas the Plaintiff being his Heir, exhibits a Bill to be relieved and to have the Land, supposing there was sufficient to pay all, without Sale of Plumpsted, &c. Cross Bills were exhibited.

1. Purchaser of Lands appointed to pay Debts, is safe tho' there be a Deficiency of the Personal Estate.
1 Chan. C. 98, 286.
Ante 52, 98.
Post 286, &c. ibid.

1st. The Lord Chancellor declared, that when Lands are appointed or conveyed to pay Debts, the Heir is intitled to have the Lands after the Debts paid.

2dly. A Purchaser buying the Lands, is not concerned whether there be Sufficiency, or not: For if he buy and pay, tho' there were a Deficiency to pay the Debts out of the Personal Estate, that yet he should hold the Lands against the Heir, and the Heir must take his Remedy against the Trustee; and so if the Matters rest in Account between the Heir and Trustee, his Purchase is safe tho' the Money be mispended by the Trustee.

2. But otherwise if the Purchase be lite pendente, by the Heir against the Executor.
Ante 85.
Post 221, 223.

Lis pendens. Notice in Law. Vide ante 85, 115. Poſt 223.

But Lis pendens between the Heir and Truſtee to have an Account, is ſufficient Notice in Law without actual Notice of the Suit, ſo that if he purchaſe, it is at his Peril: So that if in the Event of that Suit, it falls out that the Debts were paid when he purchaſed, or ſufficient of the Perſonal Eſtate to pay his Debts without Sale, the Heir will recover againſt the Purchaſer; but if it fall out there was a Neceſſity to ſell them, then the Purchaſer is ſafe.

But ſuch Dependance of Suit muſt be real, and not colluſive.

Nota; In this Caſe the Bill was filed the 18th of June, 1661. but no Proceſs ſerved on Aſton till November 1661. and Sir Robert Aſton's Covenant was in July 1661. mean between the Bill and Proceſs ſerved; but at Common Law if an Executor be ſued, and after an Original Pay a Debt of the ſame Nature without Notice of the Original, he is excuſed. But it ſeems to me the Caſes differ, for an Executor is a Perſon known, to whom the Plaintiffs may give Notice, but the Purchaſer is individuum vagum; any Man may purchaſe, and the Heir cannot know to whom to give Notice.

The Queſtion that was here, was, Whether the Legacy of Ruperta, the 1000 l. were liable on the Land, or no? And true it is, that originally it is not, and there were divers Queſtions aroſe upon that.

Firſt, Whether the Will were revoked by the Deed?

The Opinion of the Chancellor was, that it was revoked by the Conveyance; and that was not much oppoſed.

Legacy to be paid out of the King's Debt fails, if the Debt does.

Secondly, It was objected, that the Legacy of the 1000 l. was given out of the King's Debt, which failing, the Legacy failed: And if ſo, it was agreed the Legacy failed.

But it was anſwer'd, that the Gift of the Legacy was abſolute in the firſt Clauſe, the Raiſing it out of the Debt, and the following Clauſe, but a Direction how to come by it the ſooner; but then it was objected, that the Will charges only the Perſonal Eſtate with the Legacy; for as to the Land, tho' the Will at firſt charged the Land with the Legacy, yet

the Will being revoked, the Personal Estate stands charged with it only, and not the Land.

Resp. It is true the Land does not stand charged with the Legacy originally, but there was enough of the Personal Estate to pay the Legacy if it had been so employed; and therefore when that Personal Estate is employed for Payment of Debts in ease of the Heir and Lands, so much of the Real Estate as is eased by the Personal Estate, shall be liable to the Legacy.

The Lord Chancellor decreed accordingly, and a Master to take the Account.

Heir eased out of the Personal Estate. Legatee, Recompence from the Heir, &c. Vide ante 4, 5, 84, 85. and the Cases there cited. See also 1 Chan. C. 74,98,271,295,297. 2 Salk. 416. 1 Salk. 154. 1 Vern. 167; 204; 271.

Anaud *contra* Haniwood. 1682.

BEnjamin Haniwood Citizen, &c. of London, had Issue the Plaintiff's Wife Sarah, and the Defendant his Son, and by Articles covenanted to advance and secure to his Son 4000 l. to be laid out in Lands, which were to be settled on his said Son for 99 Years, if he lived so long, the Remainder to his Wife, whom he was to marry, for her Life, the Remainder to his first, second, &c. and other Sons in Tail, Remainder to the Heirs of his Son, and gave 100 l. to his Daughter in Marriage, and after made a Will in Writing subscribed by him, wherein he declar'd his Daughter not fully advanced, and by another latter Will declared that she was fully advanced, and the former Will being revoked, died, but the 4000 l. was paid, and the Land bought and settled: He left other Personal Estate of 2000 l.

Marriage. Custom of London. 1 Chan. Rep. 26, 27, 84. Post 129. 2 Chan. Rep. 179. 1 Lev. 227. 2 Lev. 130. 2 Jon. 204.

The Daughter sued in Chancery, and the Questions were two:

First, If the Daughter were full advanced according to the Custom, or no? viz. if the Declaration of the Father by Will subscribed, and after revoked, were sufficient to declare her not fully advanced; for such Declaration by Will is of no Effect, because the Will was become void; for determining of which, it was written to the City to certify: And 26 April, 1681. it was certified from the City, that it was a sufficient Declaration, and so she was admitted to come in for a Child's Part, bringing in the 800 l. in Hotchpot.

The

The Cauſe proceeding to a Hearing, a ſecond Queſtion did ariſe, viz. If the Son ſhould ſhare in the 2000 l. without that he brought in the 4000 l. in Hotch-pot; for Trial whereof it was likewiſe referred to the Court of Aldermen, who made a ſpecial Report, viz. That the Caſe appeared to them to be, that the Teſtator in his Life-time, by Articles of Agreement entred into before the Defendant's Marriage, covenanted with the Defendant's Wife's Father, to advance and ſecure 4000 l. in the Hands of Colvill, or ſuch others as ſhould be agreed on, at Intereſt in the Defendant's Name, until Lands could be purchaſed therewith to be ſettled.

To the Uſe of the Defendant for Life, and afterwards to his Wife for her Jointure, and then to their ſeveral Children ſucceſſively, and afterwards to the right Heirs of the Defendant.

And until ſuch Purchaſe made, the Intereſt of the Money was to be to the Defendant for his Life, then to his Wife for Life, and afterwards to thoſe to whom the Remainder ſhould have come in Caſe the Purchaſe had been made.

That the Money was paid and laid out in Lands, in Purſuance of and according to the ſaid Articles, before the Defendant's Father's Death; and the Queſtion being thereupon, whether according to the Cuſtom of the City the 4000 l. ſo paid and laid out purſuant to the ſaid Articles, be an Advancement to exclude the Defendant from any Share of the Orphanage Part of his Father's Perſonal Eſtate, without bringing the 4000 l. into Hotchpot? And they certify,

That a Portion in Money given by a Freeman of London to his Son, has ever been taken for and towards the Advancement of ſuch Son out of his Father's Perſonal Eſtate, within the Cuſtom of the City: Alſo that Lands of Inheritance ſettled by the Father on his Son, are no Advancement of the Son, within the Cuſtom, to bar him of the cuſtomary Part of a Perſonal Eſtate.

But whether the 4000 l. advanced and paid by the Teſtator upon his Son's Marriage, purſuant to the Articles for purchaſing of Lands to be ſettled upon his Son and his Wife, and to the other Uſes therein mentioned, be by the Cuſtom of the City an Advancement of the Son, to bar him of ſuch his Cuſtomary Part, they cannot determine, for that they have not known, nor can find in any of

the Records of the City any Precedent of the like Case; and therefore they submit the same to the Court, and now the Cause is at hearing on that Certificate. When the Plaintiff's Counsel had begun to argue, that this Money coming only out of the Personal Estate of the Father, and the Father thereby lessened his Personal Estate, which else would have fallen to his Children, and therefore no Way like the Case, where the Father parts with his Lands to his Son, and would have proceeded to other Reasons, that the Custom of the City is the Law of the Place, and not tyed to such Strictness as private Customs of Wills, or Places are.

The Lord Chancellor interposed, and said, that it was a clear Case, and he had known so in his Time, several Times, and that in this very Case: The Mayor and Aldermen were of that Opinion; and making some Reflections, as that the Certificate had not been fairly obtained, decreed against the Plaintiff, that the Defendant might share in the 2000 l. without bringing the 4000 l. into Hotch-pot.

Beckford *contra* Beckford. *The same Day.*

S. C. 2 Chan. R. 359.

London Custom. Ante 117. &c. ibid.

Decreed that where a Citizen had several Children, and some of them are advanced and some not, the advanced Children die, the Father dieth, there shall be no Consideration had of the dead Children who were advanced, but it is all one as if they had never been.

Doyly *contra* Smith. 16 July.

New Bill after Dismission on the same Equity by a third Person, because he could not have a Bill of Revivor. Q. 1 Chan. C. 37, 152, 174, 193.

A Question was, Whether a Settlement made on the Defendant's Wife on Payment of 2000 l. were so made as that it was redeemable as a Security, or no, by those in Remainder, after an Estate-Tail limited to the Defendant's Wife. John in Remainder in Tail exhibited a Bill, being the next in Remainder, to redeem and pay the Money; after Witnesses examined, and the Cause heard, he was dismist: But pending the Suit he levied a Fine, to the Intent to enable himself to pay and redeem, and limited the Use as before, which was to the Use of the Heirs Male of his Father Robert. To which he and the Plaintiff his Brother were Inheritors; the Dismis-

Diſmiſſion of John was pleaded in Bar; the Plea overruled, becauſe he could not have a Bill of Review, tho' the former Bill of John was grounded on the ſame Equity 16 July, 1682. but it was ſaid, that the former Diſmiſſion was on other Matters.

S. C. 1 Vern. 167.

Nott *contra* Hill. 20 July, 1682.

Bargain of exceſſive Value gained in Time of Neceſſity ſet aſide.
1 Ch. C. 276, &c. ibid.
Ante 15.
Poſt 136, 137.
1 Vern. 167, 271.
2 Vern. 14, 27, 77. &c.

SIR Thomas Nott, Father of the Plaintiff, upon ſome Occaſion not very juſtifiable on his Part, viz. becauſe 10000 l. which was to be laid out in Lands for his Children by Mrs. Thinn his firſt Wife, Mother of the Plaintiff: The Plaintiff did not conſent that his ſaid Father, then married to a ſecond Wife, ſhould have that Money; the Father allowed the Plaintiff no Maintenance at all, but he was put to Extremity of Miſery and Want; and having an Eſtate-tail in a Building at Richmond, called the Queen's Stables, of 30 or 40 l. per Annum Value, a Remainder after his Father's Death, with Remainders to others. Hill, Father of the Defendant, an Attorney at Law, did in the Time of the Plaintiff's Neceſſity furniſh him with 30 l. and agreed to pay him 20 l. per Annum during the joint Lives of him and his Father; which Annuity was paid for five Years; he conveyed to Hill the ſaid Buildings in Fee, and the Bill now is to be relieved, and have a Reconveyance, as being a Conveyance gotten at a great Undervalue and gained by Extremity, working on the Plaintiff's Neceſſity; and ſuch Conveyances and Bargains, gotten from young Men in their Father's Life-time, have been often relieved when they have been gained by Occaſion of the Weakneſs, viz. Prodigality or Neceſſity of young Heirs in their Father's Time; and there is no Difference whether ſuch Bargains be for Lands or Money.

Econtra. The Defendant's Counſel objected, That here is no Art uſed to draw the Plaintiff into the Bargain; he hath no Money lent, but the Bargain was of his own Seeking, and was hazardous; for if the Plaintiff had died, being Tenant in Tail, the Money had been loſt; and if the Father had lived, it might have proved a hard Bargain, the Houſes are ruinous, and of but ſmall Value.

Lord Chancellor. But the Case Hill had given him 30 l. to have five Times so much on the Father's Death, should not the Court relieve in such a Case? Here you have five Times the Value in Land: and decreed for the Plaintiff. He said, by the Civil Law a Bargain of double the Value shall be avoided, and wish'd it were so in England.

A Bargain of the double Value by the Civil Law set aside.
See 1 Chan. C. 276, and the Notes ibid.

Pollard *contra* Downes. 21 July, 1682.

A Trustee at auter die made a Letter of Attorney to J. S. to manage and receive the Rents and Profits of the Lands, who did so, and accounted to the Trustee, and now being sued by the Cestui qui trust insisted that the Trustee, not he, was to account, and he having already accounted he might be quiet as to the Plaintiff; But the Chancellor decreed him to account to the Plaintiff.

Note; The Trustee was dead, but that was not yielded as the Reason.

Double Account by the Servant of the Trustee.
Post 123, 124.

Barebone *contra* Barnes. 22 July, 1682.

Barnes possessed and interested in the Lands for fifty Years, yielding 5 l. per Annum, and indebted and in Danger of an Arrest, by Articles sealed assign'd his Estate to the Plaintiff for 290 l. and his Tools and other Utensils on the Premisses, then employed for making of Brick. The Articles are dated 16 March, and a Proviso, that if the Money were not paid, &c. in five Days, then to be void; the Articles were not performed or Money tendred, but there being no Proviso in the Articles for the Discharge of the Defendant, for the Rent in future, there arose some Discourse about it: They both went to Mr. Moser, a Counsellor, about it, and he propounded that Barebone should endeavour to purchase the Inheritance, or else procure a sufficient Person to take the Assignment from Barnes and secure him, or to that Effect; and to that End the Matter to be respited for fourteen Days. Barebone treated with the Reversioners, but they would have nothing to do with him; he notwithstanding took Possession and brought in Materials, and agreed with the Labourers, but the Time when, did not clearly appear, but it seemed to

Underhand Agreement.
Vide 1 Chan. C. 202, 302.

he within the fourteen Days after, but the fourteenth Day Price & Banker came with him and brought 290 l. and Price offered himself to be Assignee, and that he would covenant for the Landlord's Rent, but no Writing was offered or prepared. Barnes took Advice of Counsel and also of one Nell, which Nell first made the Agreement for the same with Barnes (as he said) for an able and sufficient Friend of his, but would not discover his Name till the Articles for Barebone were prepared. Barnes sells his Interest for 290 l. to the other Defendant, and the Bill is to have an Assignment to the Plaintiff, because Barnes had Notice. Barebone had only given 20 l. earnest, and now the Cause was heard, and the Plaintiff's Bill dismist.

For the Suit arising upon an Agreement in Writing, that seems complicated with a fraudulent Intent, to which the Plaintiff himself was Party. It is no Way consonant to Equity to favour Iniquity, by carrying such Intent into an Execution. (See 1 Chan. C. 25, 30, 76, &c.) For tho Equity will relieve against Frauds, &c. yet he who is Particeps fraudis, shall have no Relief. Ibid. 97, &c. See also ibid. 202, 302.

DE
Term. Sanct. Mich.
Anno Regis 34 Car. II.
IN
CANCELLARIA.

Brent *contra* Engliſh. 13 Octob. 1682. Q. 1 Vern. 69.

A. Mortgages to B. then after C. hath Judgment in Debt againſt A. and then after A. mortgageth to D. B. D. and A. accounted what was due to B. D. paid him his Money, and B. aſſigns his Mortgage to D. C. ſues D. to pay him the Debt, and to have an Account of what was really due to A. and himſelf. D. pleads the former Account. Mortgage and double Account. Ante 121.

1ſt. Lord Chancellor declared that C. was to be admitted to redeem paying what was due.

2dly. But it was debated and inſiſted on by the Counſel of D. that the Account ſhould conclude C. though no Party thereto.

Lord Chancellor remembred Cox and Shearman's Caſe pro Quer'.

Reſp. There the Account was litigated, here it is voluntary.

Lord Chancellor. Anſwer the Bill.

Haycock *contra* Haycock. *Eodem die.*

Double Account. Party. Ante 121, 123. Legacy abated. 1 Chan. C. 149.

THE Teſtator deviſed 600 l. to A. 700 l. to B. 700 l. to C. The Executor waſted the Eſtate, B. ſueth her Executor, who pleads in Abatement of the Legacy to C. and that the Teſtator by the Will did alſo appoint that if his Eſtate fell ſhort to pay them, that each Legatee ſhould proportionably abate, which is no more than what the Law is in ſuch Caſe. And if his Eſtate did increaſe and improve, then each Legacy to be proportionably encreaſed, and therefore C. ought to have been Party to the Bill, for the Account made with the Plaintiff will not conclude C. and ſo he ſhould be put to two Accounts and double Proof and Charge.

Solicitor pro Quer. In Caſe a Legacy had been given to two, one could not ſue; or if Reſiduum bonorum be given to divers, they muſt all join; but when Legacies are given to divers Perſons, each alone may ſue for his own Legacy.

Chancellor. Anſwer without Coſts.

S. C. 1 Vern. 60, 84, 144.

James Bovy *contra* Smith *and* Bony.

Deviſe. Eſtate.

MRS. Abeel, Mother of the Plaintiff, and to whom he is Heir at Law, had four Daughters, Siſters to the Plaintiff. Mrs. Abeel ſeiſed in Fee of Houſes in Chelſey, thoſe Houſes were by her conveyed to William Bovy and four others, to the Uſe of them and their Heirs, in Truſt to convey the ſame to ſuch Perſon and Perſons, and for ſuch Eſtate and Eſtates as ſhe ſhould appoint, and in Default of ſuch Appointment to the Plaintiff and four Siſters equally to be divided, and to their Heirs. She after made her Will, and thereby appointed the Truſtees to convey the Houſes to the Daughters, not mentioning for what Eſtate, and after to ſuch the eldeſt Child of the ſaid Daughters as ſhould be living at her Death, and died.

The first Question was, Whether the Plaintiff, her Heir at Law, had any Title to the Trust after the Death of the Daughters and Child; and it was decreed that by the Will, that Daughters and Child had but Estates for Life in the Trust, and the Fee is limited by the Will to them in Default of Appointment; but she having appointed another Estate to them, and what she did not appoint, viz. the Trust of the Fee-simple, descended to the Plaintiff her Heir.

2dly. The Question was, Whether though the Plaintiff had once a Title, yet whether by other Matters in the Case he was not barred, viz. three Fines with Proclamations, Purchase made for valuable Consideration, an Arbitrement also whereto he was Party, and two Releases, viz.

William and the other Trustees did convey the Houses to the four Daughters and their Heirs; their Husbands are Parties to the Conveyance which expresseth, that it was in Performance of the Trust, after several Purchases and Conveyances of the several Shares were made among the Husbands and their Wives, and several Fines with Proclamations levied, and all came thereby to Box in Fee; and he and his Trustees for 1250 l. conveyed to the Defendant William Bony in Fee, who was one of the first Trustees, and many more than five Years Non-claim by the Plaintiff were elapsed before the Bill.

17 October, 1682. 34 Car. 2. this Cause decreed.

First, It was answered, That the Non-claim or Fines could not hurt the Plaintiff's Title, because the Fines were levied to Parties privy to the Trust, so as what Estate soever passed to them, the Trust was not disturbed, for they who purchased with Notice and Privity are still liable to the Trust.

Fine no Bar of Trust, if Notice. Vide ante 64. Post 247, &c. ibid.

Sir John Churchil insisted econtra. That if a Trustee for valuable Consideration alien by Fine with Proclamation to one who hath Notice, the Alienee shall be subject to the Trust, but the Cestuy qui Trust must within the five Years sue and make Claim, or else he shall be barred, for the Alienation was a Breach of Trust and Cause of Suit.

Lord

Haycock *contra* Haycock. *Eodem die.*

Double Account. Party. Ante 121, 123. Legacy abated. 1 Chan. C. 149.

THE Teſtator deviſed 600 l. to A. 700 l. to B. 700 l. to C. The Executor waſted the Eſtate, B. ſueth her Executor, who pleads in Abatement of the Legacy to C. and that the Teſtator by the Will did alſo appoint that if his Eſtate fell ſhort to pay them, that each Legatee ſhould proportionably abate, which is no more than what the Law is in ſuch Caſe. And if his Eſtate did increaſe and improve, then each Legacy to be proportionably encreaſed, and therefore C. ought to have been Party to the Bill, for the Account made with the Plaintiff will not conclude C. and ſo he ſhould be put to two Accounts and double Proof and Charge.

Solicitor pro Quer. In Caſe a Legacy had been given to two, one could not ſue; or if Reſiduum bonorum be given to divers, they muſt all join; but when Legacies are given to divers Perſons, each alone may ſue for his own Legacy.

Chancellor. Anſwer without Coſts.

S. C. 1 Vern. 60, 84, 144.

James Bovy *contra* Smith *and* Bony.

Deviſe. Eſtate.

MRS. Abeel, Mother of the Plaintiff, and to whom he is Heir at Law, had four Daughters, Siſters to the Plaintiff. Mrs. Abeel ſeiſed in Fee of Houſes in Chelſey, thoſe Houſes were by her conveyed to William Bovy and four others, to the Uſe of them and their Heirs, in Truſt to convey the ſame to ſuch Perſon and Perſons, and for ſuch Eſtate and Eſtates as ſhe ſhould appoint, and in Default of ſuch Appointment to the Plaintiff and four Siſters equally to be divided, and to their Heirs. She after made her Will, and thereby appointed the Truſtees to convey the Houſes to the Daughters, not mentioning for what Eſtate, and after to ſuch the eldeſt Child of the ſaid Daughters as ſhould be living at her Death, and died.

The firſt Queſtion was, Whether the Plaintiff, her Heir at Law, had any Title to the Truſt after the Death of the Daughters and Child; and it was decreed that by the Will, that Daughters and Child had but Eſtates for Life in the Truſt, and the Fee is limited by the Will to them in Default of Appointment; but ſhe having appointed another Eſtate to them, and what ſhe did not appoint, viz. the Truſt of the Fee-ſimple, deſcended to the Plaintiff her Heir.

2dly. The Queſtion was, Whether though the Plaintiff had once a Title, yet whether by other Matters in the Caſe he was not barred, viz. three Fines with Proclamations, Purchaſe made for valuable Conſideration, an Arbitrement alſo whereto he was Party, and two Releaſes, viz.

William and the other Truſtees did convey the Houſes to the four Daughters and their Heirs; their Husbands are Parties to the Conveyance which expreſſeth, that it was in Performance of the Truſt, after ſeveral Purchaſes and Conveyances of the ſeveral Shares were made among the Husbands and their Wives, and ſeveral Fines with Proclamations levied, and all came thereby to Box in Fee; and he and his Truſtees for 1250 l. conveyed to the Defendant William Bony in Fee, who was one of the firſt Truſtees, and many more than five Years Non-claim by the Plaintiff were elapſed before the Bill.

17 October, 1682. 34 Car. 2. this Cauſe decreed.

Firſt, It was anſwered, That the Non-claim or Fines could not hurt the Plaintiff's Title, becauſe the Fines were levied to Parties privy to the Truſt, ſo as what Eſtate ſoever paſſed to them, the Truſt was not diſturbed, for they who purchaſed with Notice and Privity are ſtill liable to the Truſt.

Fine no Bar of Truſt, if Notice. Vide ante 64. Poſt 247, &c. ibid.

Sir John Churchil inſiſted econtra. That if a Truſtee for valuable Conſideration alien by Fine with Proclamation to one who hath Notice, the Alienee ſhall be ſubject to the Truſt, but the Ceſtuy qui Truſt muſt within the five Years ſue and make Claim, or elſe he ſhall be barred, for the Alienation was a Breach of Truſt and Cauſe of Suit.

Lord

Lord Chancellor contra. There were then no Safety of any Trust, if a Trustee or Mortgagee should levy a Fine to one who hath Notice, if that should bar by Non-claim: He therefore decreed, that notwithstanding those Fines and Non-claim, the Plaintiff's Title was untouched by them. He further declared, that a Title in Equity or a Trust, is and should be barred by Non-claim and Fine; but that must be where the Person to whom the Fine is levied, hath no Notice; and in such Case the Claim must be a proper Way: If it be of a Trust or Title in Equity, it cannot be by Entry, but Subpœna; and if he have Title by Writ at the Common Law, and his Entry not lawful, an Entry is not good to save the Right.

Revivor of Trust.

2dly. Admitting the Fine and Non-claim did bar the Plaintiff's Claim of the Trust: Yet when he, that broke the Trust, comes afterwards to be Owner of the Land, tho' on good and valuable Consideration, the Trust as to him revives again, and he shall be liable to make Satisfaction, and restore the Land to the Trust, and it shall not lie in his Power to defend himself, by Breach of Trust, and this is so at Common Law for Lands. A Disseisor aliens; the Alienee dieth seised: Now the Entry of the Disseisee is barred; but if the Land come again to the Disseisor, the Entry of the Disseisee is reviv'd. So for Goods, if a Trespasser of Goods sell them in Market overt, the Owner's Title is barred, but he may seise them if they come to the Trespasser again: So in a Case of Equity, Norton against the Earl of Cunale.

Churchill. William Bony was but one of the four that broke the Trust.

Lord Chancellor decreed for the Plaintiff.

Release.

3dly. As to the Release and Arbitrament, it appear'd tho' the Release was of all Actions and Demands; yet it appeared that the Arbitrament, Submission and the Release, was made on Differences only, concerning other Matters, viz. the Shares of the Parties of the Personal Estate of another dead Kinsman, and was for them and their Executors to the Parties and their Executors, and not Heirs.

4thly. The Plaintiff had given a distinct Release before the Purchase made, of all Actions real and Personal; yet there was no Occasion proved why that Release should be made, nor any alledged, and there were other Dealings be-

tween them: Therefore presumed not to relate to this Matter, and so the Decree passed for the Plaintiff.

Afterwards the Lord Chancellor declared at another Day, that he had conferred with the Chief Justice of the King's Bench, who was of the same Opinion.

Davies *contra* Moreton. Nov. 1682.

Purchaser not re- lieved against the Title of A. who en- couraged him to

Moreton possessed of a Lease for Years, for 200 l. assigned to the Plaintiff Davies, on Condition not to alien without Licence. Davies without Licence mortgaged the Lease. Davies becomes a Bankrupt: The Commissioners assign to the Plaintiff, who exhibits his Bill to be relieved against the Forfeiture, and to redeem, if so be that the Mortgage were before the Act of Bankruptcy; for the Mortgage was pretended to be but five Weeks before the Commission: Moreton waves the Advantage of the Forfeiture, if he may be paid the 200 l. which was the Consideration of the Assignment he made; but he had on the Assignment taken Bond of Davies for it, and that was a Security, and determined the Contract for the 200 l. so he had chosen his Security, and might not thereby charge the Lease, or the Assignee thereof, if he had taken an Assignment. And further, he did actually come in as a Creditor for the 200 l. before the Commissioners, and paid Contribution.

Forfeiture discharged by taking a Bond. See 1 Chan. C. 184, 189.

But the Lord Chancellor would not relieve against the Forfeiture, without Payment of the 200 l.

Quære, If he would at all relieve against the Forfeiture, unless Moreton had offered it in his Answer, so as he might be paid the 200 l.

Husbands *contra* Husbands. *Eodem die.*

S. C. 1 Vern. 95.

A. Seised in Fee, made his Will in Writing, and charged his Lands and Personal Estate with 400 l. to finish a Building which he had begun, and was unfinished when he died; the Will as to the Personal Estate was good, but not good as to the Land.

Lands charged by Will to finish Building, not good.

Hobbs

S. C. 1 Vern. 136.

Hobs *contra* Norton, &c.

The Case.

Purchaser not relieved against the Title of A. who encouraged him to purchase when, and when not.
Vide ante 108. Dyer contra Dyer.

THE Father of two of the Defendants granted to the younger Brother and his heirs, an Annuity, charged on the Land in Question, with Power of Revocation, and died. The younger Brother treated with Hobs to sell to him the Annuity. Hobs before his Purchase inquired of the elder Brother whether there was any Revocation made; he told him none; that he had still paid the Rent, and knew nothing to the contrary but that he must pay it, and much to that Effect, and continued Payment. Hobs, for valuable and full Consideration, purchased the Annuity of the younger Brother. The elder Brother, after some Time of Payment to Hobs, refuseth Payment of the Annuity. Hobs exhibited a Bill to be relieved, as in Amy's Case, where a Mortgagee or Conizee of a Statute was enquired of by him who was in Treaty to purchase the Land, whether the Land was free of Incumbrances, and was told by him that there was none, and that he might safely purchase: Whereupon he purchases, and was relieved against the Mortgagee.

The Heir's Defence was, that he did acknowledge the Inquiry, and his Answer thereon, but then knew nothing to the contrary; but yet that ought not to prejudice him, for that since then he had discovered a Settlement made by the Grandfather, on Marriage of the Father, Grantor of the Annuity: Whereby in Consideration of Marriage, and a valuable Consideration of Money, the Lands were intailed on the Father, to which Intail he was Heir, and by Consequence the Grant of the Annuity void as to him; and that this Settlement was concealed from him till of late, that his Payment and Acknowledgment was while he was ignorant of his Right, and innocently done, and ought not to oblige him: That Amy's Case differs from his; for there was a Fraud to draw on a Purchaser, in encouraging the Purchaser against his own Act and Knowledge; it was Fraud, if not Malice, to do so.

There was another Point arose on the Debate, but as to this the Lord Chancellor delivered no Opinion.

Aunand & Ux. *contra* Honiwood.

A Citizen and Freeman of London having two Children, married one of them and gave her a Portion, and after made a Will in Writing, and gave her a further Sum; declaring therein that his Estate should be divided, according to the laudable Custom in Thirds, &c. Which Will was subscribed by him, afterwards he made two other Wills in Writing; wherein, (being also by him subscribed,) he declared that he had fully advanced the said Daughter; and in the last did upon that Reason, give her 500 l. she marrying the Plaintiff, they sue in Chancery for a Child's Part, bringing into Hotch-pot what she had received, and that the other Child might bring into Hotch-pot what he received; the Suit was against the Executor, &c. And decreed accordingly upon the Certificate of the Recorder, Ore tenus, made the 10th of May, Anno 1681. who certified that by the Custom of London, That a Declaration made by a Citizen and Freeman, &c. with his Hand or Mark subscribed thereto, tho' such Writing were made for the last Will and Testament, and the same afterwards by him revoked, is such a Declaration as will let in such a Child of such Freeman, to a Child's Part.

London Orphanage Part.
Ante 117, 119.
2 Chan. Rep. 179.
1 Lev. 227.
Post 160, 229.
1 Chan. C. 182, 199, 285, &c.

And it was further decreed, that the Defendant be examined before a Master on Interrogatories; to one whereof he demurred, and set forth that he and the Testator were joint Partners in the Trade of a Woollen-Draper, and each brought in 1000 l. into the Stock; so they were Jointtenants, and he was Survivor, and claimed the whole Stock, and the Debts belonging to the Stock by Right of Survivorship; but the Benefit of Survivorship was denied, being in Trade, tho' not Merchant-Adventurer.

Surviving Tradesman.
See 1 Chan. C. 239.

Jones *contra* Waller. Novemb. 1682.

An Administrator possest of a Term charged with a Trust, assigns it in Trust for himself: The Administration on a Suit by Citation, (not Appeal) is revoked, and now granted to the Plaintiff: At his Suit the Assignment decreed to be set aside.

Assignment of a Term by the Administrator to his own Use, set aside by subsequent Administrator.

Anonymus. *The same Day.*

Deviation, nauticum fœnus. Vide ante 36, 76. Post 198, 238. 1 Chan. C. 25, 76.

THE Plaintiff entred into a Penal Bond of Bottomry to pay 40 s. per Month for 50 l. The Ship was to go from Holland to the Spanish Islands, and so to return for England: If she perished the Plaintiff lost his 50 l. She went accordingly to the Spanish Islands, took in Moors at Africk; and upon that Occasion went to the Barbadoes, and then perished at Sea. The Plaintiff being sued on the Bond for the Penalty, sought Relief in Chancery, pretending that the Deviation was on Necessity.

The Bill was dismist saving as to the Penalty.

Uvedale *contra* Ettrick. 6 Decemb. 1682.

MR. Uvedale, the Plaintiff's Husband, being seised of the Manors of Loverley and Monuton, and of the Farm of Martin, worth 600 l. per Annum, and of the Manor of Horton worth 500 l. per Ann. and indebted 10000 l. made his Will, and thereby devised the Premisses to be sold, and devised 1500 l. to one Child, and 1000 l. to two others; and after his Debts and Legacies paid, the Surplus of the Land to be convey'd to his Heir: The Devisees which were to sell, were the Wife who is the Plaintiff, Ettrick, Reeves, Hurst and Constantine. The Testator died, having after his Marriage with the Plaintiff, mortgaged Horton, so as the Plaintiff was dowable of all the Estate. The Defendants to the Bill were the four Trustees, and the Heir which was to have a Sale made, but principally that Ettrick might be put out of the Trust. The Wife, one of the Trustees, was drawn into Agreement to release her Dower in the 600 l. a Year, and to give a Bond of 4000 l. that if any of the Children died, she should not take Administration, except they all died; after which Ettrick turns to be the Plaintiff's Enemy, and divers Matters are charged in the Bill upon Ettrick, as if he practised to get Horton, and to be the whole Manager himself. Reeves in his Answer prays to be excused in the Trust; Constantine and Hurst were not willing to join with Ettrick in the Trust.

At the Hearing the Plaintiff declared, being present in the Court, that though she had Reason to be relieved against her Release and Bond, in Regard by the Agreement she was to have her Dower set out of Horton, and the Houshold Goods in Horton-house; yet still she was contented to accept such Dower in the Third of Horton, which amounted but to 150 l. per Annum, and to join in the Sale of the Rest of the Land, thereby to extinguish her Dower therein, and to leave the Goods in the House for the Heir, so that Ettrick might be discharged of the Trust: On the other Side, Ettrick insisted to be continued in the Trust, and would attend a Master from Time to Time to get a Purchaser, and to do all reasonable Acts, &c.

The Plaintiff's Counsel insisted, it being a joint Trust, and could not now be so executed, all refusing to join with Ettrick, therefore it belonged to the Court to order it.

A Trustee remov'd out of the Trust.

Lord Chancellor. I like not that a Man should be ambitious of a Trust, when he can get nothing but Trouble by it; and declared that without any Reflection on Ettrick, he should meddle no further in the Trust, &c.

From the foregoing and other like Cases we may observe, That as a Trust is a Creature of Equity (as ante 64.) so Equity will not only modify and regulate the Execution of Trusts, but also direct, limit and controul the Acts of the Parties, Trustees, Guardians, &c. and this even in Cases where they are by Will or Deed vested with a general Power. Vide post 144, 199, 211, 245, 238, 239.

DE
Term. Sanct. Hill.
Anno Regis 34 & 35 Car. II.
IN
CANCELLARIA.

Tilsly *contra* Throckmorton. Febr. 1682.

Truſtee charg'd on Decay of the Eſtate.
Ante 25.
Poſt 256, 145.
1 Chan. C. 136, 148 or 248.
2 Vent. 260.

A Truſt to pay ſeveral Portions to ſeveral Children at their reſpective Ages: The Truſtee pays one; the Eſtate decays, ſo that there is not ſufficient to pay the others; in that Caſe the Perſon truſted paid in his own Wrong, for he ſhall make it good to the Reſt, abating proportionably out of each Party's Share, according to the Loſs; and he ſhould have taken Security in Caſe of Loſs happening: And ſo alſo tho' the Truſt or Legacy were to be paid to the eldeſt in the firſt place, or firſt, for that denotes not Preference in the Quantity.

And it was affirmed by Mr. Keck, and others at the Bar, that many Times it had been ſo decreed.

But the Lord Keeper North ſeemed of another Opinion as to the laſt Point: But agreed further at the Bar, that if the Portion of any one lay on, or out of Blackacre, or other particular Fund by it ſelf, and the others out of another Fund, each muſt bear his own Loſs.

Denny *contra* Filmer. 1682.

S. C. 1 Vern. 135.

No new Bill after Bill of Review, Q. See 1 Chan. C. 42, 53, 123, &c.

A Decree paſſed where the Bill was never anſwered, but the Bill taken pro confeſſo, tho' the Party Defendant never anſwered, but only appeared by his Clerk, and the Bill never read in Court as it ought to have been: A Bill of Review was brought, and on Demurrer diſmiſt: Now the Heir brought another Bill of Review, and tho' there was manifeſt Error, not only in the Form of the Court, but in the Right, viz. two Heirs having Title as Heirs, one of them Plaintiff had a Decree for the Whole, who had Title but to a Moiety.

Yet my Lord North diſmiſt the Bill, and ſaid there was no Remedy but in Parliament, and cited Mordant or Morgan's Caſe: Where a Bill was grounded on a Deed, whereto two Witneſſes were examined; but the Deed was not produced, and the Witneſſes not agreeing, the Bill was diſmiſt, and a Bill of Review was brought and diſmiſt: And after the Deed was found, and Affidavit of it, &c. and then a Bill of Review exhibited, but diſmiſt quia of the former Bill.

Which, ſaid the Lord Keeper, was a hard Caſe.

To which it was anſwered, that it differs from the preſent Caſe; for there the Cauſe was heard on the Merits, but here is not ſo much as an Anſwer.

Lord Keeper diſmiſt the Bill.

Anonymus. February 1681.

Voluntary Conveyance no Relief for Deeds againſt Heir. Vide 1 Chan. C. 100, 289. Ante 4, 103, &c. ib. Poſt 151.

THE Bill was to diſcover and have Uſe of a Deed, which was to lead the Uſe of a Fine levied by the Defendant's Mother, and concealed and ſuppreſt by her.

The Caſe.

The Defendant's Mother ſeiſed in Fee, ſhe and her Husband levied a Fine, which by Deed was declared to be to the Uſe of the Husband and Wife, with other Uſes, under which the Plaintiff makes Title, viz. by the Husband's Will, the Fee being limited to the Husband.

The

Voluntary Deeds, &c.
Ante 4, 69, 103.
Post 151.
See 1 Chan. C. 202, 302.
Post 151.

The Complaint is, that the Defendant suppresses the Deed. The Defendant is Heir to her Mother, and insists that the Fine was gained unduly, and denieth the having the Deed, which was voluntary without Consideration: And because the Conveyance by the Fine, &c. was voluntary and without Consideration, no Money being paid, &c. the Court would give no Relief, but left the Plaintiff wholly to Law, to help himself there as he could.

Coventry *contra* Hall. 24 Febr. 1682.

Heir to answer mean Profits (taken by him) to a Purchaser tho' the Conveyance void in Law.

SIR Thomas Thinn had Issue Sir James by one Venter, Sir Henry Frederick by another, and made a Conveyance of several Manors on Henry, which being designed by Way of Covenant to stand seized was defective, and afterward was decreed in Chancery to be relieved, and likewise settled by Act of Parliament.

Afterwards 1650. Sir Henry Thinn exhibits a new Bill against Sir James for the mean Profits, which was decreed that Sir James should account for the mean Profits from the Year 1646. when Sir James got the Possession. The Suit divers Times abated by Death, so the Decree was not completed. Sir James was dead and made Thomas, his Brother, Executor. Thomas died and made the Defendant his Executor; Sir Henry likewise died and made the Defendant his Executor.

Two Decrees for Land, yet a new Bill for mean Profits.
Ante 71, 72.

The Cause came now to be re-heard touching the mean Profits between the Executors, ab integro. Two Points were debated.

1. Whether Sir James, or especially his Executors, should be accountable for the mean Profits, for he had a Title at Law, the Conveyance being defective, and being under no Obligation of Trust or Covenant or Articles, as Heir unto his Father; and the defective Conveyance it self is not mentioned to be in Consideration of Marriage, or valuable Consideration, and therefore Sir James was not guilty: But Curia econtra.

2. The second and main Question was, Whether a Decree being first had for the Land, and no Decree for the mean Profits, a new Bill shall be exhibited for the Profits,

fits, especially, because in the first Bill Sir James was charged for taking the Profits, and Relief prayed on the whole Matter, so that Sir Henry if he had asked it, might have had Relief for the mean Profits; and it is not denied, but that he might have had a Decree, if he had prayed it.

My Lord North confirmed the former Decree made by the late Lord Nottingham for the mean Profits, and that the Executor of Sir Thomas Thinn, Executor of Sir James, should account for them so far as the Estate of Sir James, &c.

Brown *contra* Williams. 28 Feb. 1682.

THE Assignee of a Bankrupt exhibits his Bill against the Defendant to discover Goods of the Bankrupt, that came to his Hands after the Bankruptcy. The Defendant by Way of Plea sets forth, that he had no Goods of the Bankrupt's, or that ever were his, but what he bought for full and valuable Consideration, and bona fide; and that at the Time of the Sale and Payment of his Money, he had no Notice either of the Commission or of any Act of Bankruptcy committed by the Bankrupt.

On long Debate the Plea was allowed by the Lord North, and to take what Remedy they could before the Commissioners, or at Law,

Hutchins, Counsel for the Defendant, cited a former Precedent, but was not produced.

Purchaser of Bankrupt without Notice not bound to discover.
Bankrupt.
Vide ante 73, 108, 128.
Post 136, 156.
1 Chan. C. 36, 37. 247.

Leak *contra* Morrice. *The same Day.*

THE Bill is to have an Agreement performed by the Defendant, which was in Effect, that the Defendant should assign a Term of Years in his House, and Plate, and certain Vessels of Beer for 200 Guineas, whereof he paid one in Hand as Earnest of the Bargain, and three Days after nineteen Guineas more; and Part of the Bargain was, that it should be executed by Writings by a certain Time.

The Defendant pleaded the Statute for Prevention of Frauds and Perjuries, and that it was a parol Agreement, and none of the Goods delivered by the Defendant, so there ought

Stat. 29 Car. 2. pleaded and overruled.

ought to be no Relief in Law or Equity, but confeſt the Receipt of the 20 Guineas, and offered to repay them.

Keck pro Def. at the Bar enforced the Plea, becauſe it was to take away the Defendant's Trade, and alledged the Money was only paid for the Leaſe.

Lord Keeper. It is clear the Defendant ought to repay the Money; it is charged that the Agreement was to be put in Writing.

It was anſwered, Yea.

Whereupon the Lord Keeper over-ruled the Plea.

Anonymus. *The ſame Day.*

Purchaſer without Notice of Bankruptcy not chargeable in Equity to diſcover.
Vide ante 47, 48, 122, 126, & Poſt 246, &c. ibid.

ASſignee of the Commiſſioners of Bankrupt. Portman exhibited his Bill againſt the Defendant to diſcover Lands, &c. which were the Bankrupt's at the Time of his Breaking.

Hutchins for the Defendant pleaded, that he was Purchaſer for full and valuable Conſideration, and at the Time of his Purchaſe, and had no Notice of any Act of Bankruptcy, nor that Portman was a Bankrupt, nor of any Commiſſion, and refuſed to make Diſcovery.

And the Plea was allowed by my Lord North, Lord Keeper.

Barny *contra* Beak. Feb. 1682.

Caſual Bargain for double Value.
Ante 120.
1 Ch. C. 276, 202.
1 Vern. 167, 120.

THE Bill, That the Plaintiff's Father being aged and infirm, and allowing the Plaintiff, a young Gentleman, but ſmall Allowance, that he being in Want one Styſted got acquainted with him, and told him that he had found out a Parcel of Wines, which if he would buy, he ſhould not be inforced to pay for them till after his Father's Death; they went to Beak the Defendant, who ſold him ſeveral Hogſheads of Wines to the Value of 1280 l. and affirm'd them to be of that Value, and ſound, good and merchantable; and took of the Plaintiff a Statute of 2880 l. 17 November, 1678. defeazanced to pay 1440 l. within twenty Days after the Death of his Father. The Wines

were flat and dead, and were delivered to Styfted, who could fell them for no more than 360 l. that the Plaintiff's Father was but Tenant for Life, the Remainder to the Plaintiff; that this was done by Contrivance between the Defendant Beak and Styfted by their Fraud, and Styfted had 20 l. of the Plaintiff and other Gratification of Beak, and the Plaintiff's Father being dead, the Defendant Beak proceeded on the Statute.

The Defendant Beak by Anfwer; that he knew not Styfted, but he and the Plaintiff came to him to buy of him Wines, and he fold the Plaintiff Twenty Tuns of Claret at 36 l. the Tun, in all 740 l. and after much Treaty agreed, that if the Plaintiff died before his Father, then nothing to be paid; but if he furvived his Father, to pay double the Value, viz. 1480 l. That the Wines were good and found, and the Plaintiff fent Ady, a known Cooper, to taffe and try the Wines, who did fo; and the Plaintiff to encourage the Defendant to fell, did inform the Defendant that his Father was fickly and kept his Chamber, and denied the Fraud, and that he fold the Wines which were left, at the fame Price.

At a former Hearing, 9 February, 1680. the Lord Chancellor relieved the Plaintiff.

But now the Bill difmift, faving as to the Penalty of the Statute, for there was no Proof of any Fraud, but it was a hazardous Bargain.

Trin. 1686. this Decree revers'd by the Lord Jeffries ex relatione Servien' Hutchins.

Lord North. It may be Styfted put in other Wines, or took out of thefe and filled them again with bad.

Nota. That the fame Day, viz. 9 Feb. 1680. when the Lord Chancellor relieved Barny; he did not in another Cafe relieve though very like it, viz. between the now Plaintiff Barny and Pit. Pit lent Barny 1000 l. to have 2500 l. if Barny furvived his Father, and to lofe the 1000 l. if Barny died in his Father's Life-time, fecured by Judgment; Pit fued; Barny fought to be relieved in Equity and was difmift.

1. Pro Quer. per the Lord North.
2. Pro Def. per the Lord North.
3. And then reverfed by the Lord Chancellor Jeffries. Trin. 1686.

Amand *contra* Bradbourne.

Truſtees allowed ſeveral Coſts. Vide ante 2, 121, 132.

TRuſtee ſued concerning the Truſt in Chancery obtained a Diſmiſſion and had Coſts paid him as in Courſe, but the Coſts allowed him and tared were ſhort of his real Coſts. After a Bill by the Ceſtuy qui Truſt to have Account of the Truſt, on Account of his Diſburſements he ſhall be allowed his true and neceſſary Coſts in the former Suit, and not be concluded, &c. and ſo ordered.

DE
Termino Paſchæ,
Anno Regis 35 Car. II.
IN
CANCELLARIA.

Lord Craven *contra* Widdows. 27 April, 1682.

TWO Partners in Trade put in each an equal Stock, and agreed by Covenant that the Stock ſhould pay the Debts of the Stock, and neither of their ſeparate Debts ſhould charge the Stock, but only his own Eſtate, or to that Effect; they both became Bankrupts, and a Commiſſion againſt them both, one of them owed ſeparately more than the other. Partners both Bankrupts. Vide ante 72, 135, 136. Poſt 139, 143, 190, &c.

The Queſtion was between ſeparate Creditors of each Bankrupt, and the Creditors on Account of the Joint-Stock, for theſe would exclude the ſeparate Creditors to charge the Joint-Stock, but that it ſhould ſatisfy the Stock-Debts. Creditors of the Joint-Stock, and ſeparate Creditors equal.

But the Opinion of the Lord North econtra. For the Covenant of the Partners cannot bind any of their Creditors, but only themſelves.

Quære. How the ſeparate Creditors could have other Title than thoſe under whom they claim.

Dicitur, That if one Defendant cannot be found to ſerve Proceſs on him, if Proceſs be againſt him till Sequeſtration, and he ſhall not appear, you proceed againſt the Reſt, as when one is outlawed at Common Law. Proceſs.

S. C. 1 Vern. 157.

Brown *contra* Brown. 30 April, 1683.

Arbitrament. See 1 Chan. C. 40, 87, 185, 6, 279, 280.

THE Plaintiff was Tenant for Life, the Remainder in Tail to his firſt, ſecond, &c. Sons, the Remainder to the Defendant in Tail. The Plaintiff having no Son committed Waſte; the Defendant brought his Action for the Waſte, and at the Niſi Prius by Conſent of the Parties and Rule of Court the Matter was referred to two of the Jury to make their Award by Michaelmas; on Defect of an Award, then to Ballard an Umpire; no Arbitrament being made, the Umpire made his Award and awarded 348 l. Damages; the Plaintiff exhibited his Bill to be relieved againſt the Award, and for Equity alledged:

First, Exceſſiveneſs in the Damages.

Secondly, The Miſdemeanour in the Umpire, that he had declared before the Umpirage made, that he would not meddle in the Matter, and after Umpirage made, declar'd that he made his Umpirage for Fear he ſhould be arreſted, whence his Counſel inferred that he had been menaced.

Laſtly, That after the Submiſſion, the Plaintiff had repaired the Premiſſes, and proved Repairs made, and that 40 s. would perfect the Repairs, and therefore prayed a new Trial.

The Defendant inſiſted, that the Umpirage ought not to be ſet aſide without Fraud or Partiality proved, that his Saying he would not meddle in the Buſineſs was in Auguſt before the Time he was to make his Umpirage, as the Truth was; and the Defendant had Notice given him by the Umpire to attend, which he did not, ſo that the Umpire had no Notice of the Reparations, and if he had, it was not material to avoid the Award.

The Lord Keeper diſmiſs'd the Bill.

Baily *contra* Cotton. 13 May, 1683.

BEmble ſeiſed in Fee conveyed the Lands to the Defendant for 1000 Years, in Truſt, that whereas divers Suits and Controverſies were touching the Lands; that the Defendant ſhould defend the Suits (Nota, he was Tenant of the Land then and before to the Plain-

tiff) and Title with the Profits, and yield yearly Accounts to Bemble of all the Profits, and pay to him, his Executors and Administrators the Surplus of what he should not expend, and should pay an annual Sum after his Death to the Plaintiff, and another annual Sum to another; and died; the Plaintiff was his Cousin and Heir, and sued for Account and for the Lands, in Regard that a Trust resulted to the Heir after the expressed Trusts were performed. Resulting Trust.

The Lord Keeper dismiss'd the Bill.

And yet from the State of the Case supra it appears, That Bemble's Executors and Administrators were entitled to have an Account of the Surplus in the Defendant's hands; and consequently a Bill might well be brought by the Executor or Administrator for such Surplus; but the Bill here is brought by Bemble's Heir and Legatee, and the Testator having devised to him an annual Sum, &c. seems plainly to exclude him from all Title to the Real Estate, and the Heir is only to be preferred, where the Testator's Intent is doubtful, as 1 Chan. C. 7, &c. Sed vide ante 1, 4, 59, 69.

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DE Term. Sanct. Trin. Anno Regis 35 Car. II. IN CANCELLARIA.

Foot *contra* Salway & *al'*. 6 June, 1683.

Freight.
Merchant.
Vide ante 6, 11, 57.
Poſt 219, 238.
1 Chan. C. 25, 30, 76, 127.

FOOT let to Freight to the Defendants being of the Turkey Company, 200 Tun of a Ship, wherein he was intereſted, for a Voyage to the Streights; the Price of the Freight per Tun was not expreſſed in the Charter-Party. The Ship brought Home no Silk or other Commodities, uſed to be brought from Turkey; the Freight whereof of ſome in ſuch Voyages was 5 l. per Tun, and of ſome 6 l. per Tun, uſually and conſtantly paid, but brought home only Box-wood, the Freight whereof uſually was only 40 s. per Tun; the Defendants would pay but 40 s. per Tun; the Plaintiff's Bill is to have 5 l. becauſe though it be not ſo expreſt in the Charter-Party; yet it was expreſly agreed, that the Ship ſhould be loaden with Silks or other the Goods that paid the greater Freight, and enforc'd their Equity; for that Box-wood never in ſuch Voyages was brought Home alone, but only to fill up empty Places, but Cottons or other Goods; and no Man will ever let out his Ship, nor take Ship to freight for Box-wood only, for the Freight at 40 s. per Tun will not pay the Charge to the Owner of the Ship; and altho' the Defendants pretend that they could not freight the Ship with other Goods, becauſe the Locuſts in that Year had eaten and ſpoil'd the Cottons in thoſe Parts, yet

that might not excuſe them from their Agreement, which the Plaintiff's Counſel very earneſtly preſt to have read and proved, eſpecially Mr. Sollicitor Finch, who finding the Court againſt relieving the Plaintiff upon the parol Agreement ſaid, that moſt Part of the Cauſes in Court were of that Nature; yet the Court would not agree with him: But you may take Remedy at Law upon your parol Agreement.

Sollicitor. No, my Lord, becauſe the Deed is the Agreement in Law.

Lord Keeper. Why, when it ſtands with and not contradicts the Deed, you may ſue at Law; and on Concluſion did not relieve the Plaintiff.

Alderman Backwel's *Caſe*. Poſt 190. S. C. 1 Vern. 208.

Bankrupt. Superſedeas. Commiſſion. Ante 73, 135, 136, 139, 153, 156, 190, &c.

COmmiſſion at the Complaint of fifteen Creditors on the Statute of Bankrupts, iſſued out againſt Alderman Backwel, who died ſhortly after; theſe Creditors having Judgment, and finding that on their Judgment they might have better Remedy than their Proportion was likely to be on the Commiſſions: The Heir of the Bankrupt paid their Debts, and none other Creditors appearing then to proſecute, by their Conſent the Commiſſion was ſuperſeded, and after thirty other Creditors ſued for a Diſcharge of the Superſedeas.

Firſt, Becauſe when a Commiſſion is granted, not only the firſt Proſecutors are intereſted therein, but all that will come in within four Months; and therefore they having tendred Contribution within the four Months the Commiſſion ought not to have been ſuperſeded by Conſent of the Fifteen.

Secondly, They alledged that the Commiſſion had been dealt in by the Commiſſioners, and an Aſſignment of Lands made, and the Alderman being dead, they ſhould be remedileſs, for no new Commiſſion can be now granted, therefore prayed a Diſcharge of the Superſedeas.

On the other Side it was objected, that the Aſſignment was void being made after Backwell's Death.

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The Lord Keeper North. If I erred in granting the Superſedeas, I can diſcharge it. 2dly, But if ſome Creditors obtain a Commiſſion and receive Satisfaction, I can at their Requeſt ſuperſede the Commiſſion, if none other Creditors appear; I am not bound to call them in, elſe it were miſchievous; therefore ordered the Commiſſion to be brought in and the Aſſignment, if the Aſſignment be well, I can, &c. try that at Law.

S. C. 1 Vern. 181.

Davis *contra* Weld. 22 June, 1683.

Neceſſity. Conveyance. Vide ante 101.

Marriage-Settlement on the Plaintiff and Wife for Life, the Remainder to Truſtees for the Life of Davis in Truſt to preſerve Contingent Remainders to the firſt, ſecond, &c. Sons, &c. in Tail: They were married eleven Years, had no Children, and Davis had not the Portion of 1000 l. paid, and was in Debt 4000 l. by that and other Occaſions; the Eſtate ſettled was alledged to be 600 l. per Ann. and the Bill was againſt the Remainderman for Life to join in Sale of ſome Part which alſo could not be done, and alſo the Father and Mother eaten out with the Debts, driven to great Want, and Precedents cited where it had been done.

Truſt. Q. 1 Chan. C. 41, 189.

Lord North. I cannot juſtify to decree a Breach of Truſt; if it hath been done, it was it may be when Recompence was made; and at laſt ordered Precedents to be look'd into.

Prideux *contra* Gibben. 23 June, 1683.

Deviſor not ſeiſed.

Amery on Treaty of Purchaſe for Lands with Pollard, Articles were made, and Pollard to convey to Amery Lands called Rawſon in Fee; Amery makes his Will in Writing, and deviſeth in general Words, All his Lands to be ſold for Payment of his Debts and Legacies; After Rawſon is conveyed to him, and he after levies a Fine, and the Lord Chancellor pronounced a Decree that the Lands were well ſold though the Deviſe general, and the Deviſor not ſeiſed at the Time of the Will made, nor no new Publication of the Will being for Payment of Debts; and ſaid, that if a Man deviſe all his Lands for Payment of Debts, and after purchaſe Lands, that he would decree a a Sale although there be no precedent Articles.

John Robinſon *and* Fawknor *Plaintiffs, in a Bill of Review againſt* Nathaniel Noel, *and other Children of* Martin Noel *deceaſed, on the firſt Bill exhibited by the ſaid Children.*

The Caſe was.

THAT Martin Noel being ſeiſed in Fee of the Moiety of a Plantation in Barbadoes, by his Will in Writing, deviſed the ſame to Robinſon and Theodore Noel, who died an Infant, and made Robinſon and Theodore and James Noel, two of his Sons, Executors, and appointed Robinſon to manage the Plantation, and died; the Executors proved the Will; the Bill chargeth that Robinſon was to ſupply the ſaid Plantation during the Plaintiff's Minority, and to anſwer the Profits to them, it being for their Maintenance, and chargeth that by the Will the Plantation was deviſed to the Plaintiffs, and the ſaid Theodore ſince dead; and the Bill prayeth an Account againſt Robinſon altho' he had aſſigned to Fawknor, and leaſed to one Warſam for Years at a certain Rent, and yet had aſſented to the Legacy; for he made a Leaſe of the ſaid Half of the Plantation, reſerving the Rent to himſelf in Truſt for the Plaintiffs, and they pray an Aſſignment of the Term and Account, Theodore and James being dead and the Plaintiffs their Adminiſtrators.

Barbadoes. 2 Vent. 358. Creditor may compel a Legatee to refund. Max. Eq. 13, &c. ibid. Ante 9, 54, 132.

The Defendant Robinſon confeſſed the Seiſin of Martin Noel, the Father, and that by his Will he deviſed the ſame to him and to Theodore and to James, but denieth himſelf chargeable to the Plaintiffs.

Quære, If in Fee.

1ſt. Becauſe by the Law and Cuſtom of Barbadoes Plantations tho' in Fee are not to go to the Heir nor Legatee till Debts paid, and that the Teſtator was indebted to others and to himſelf in great Sums ultra the Value of the Plantation, and mentions the Sums, and that he not being apprized at the Time of the Leaſe of ſuch Law or Cuſtom of the Barbadoes, made ſuch a Leaſe and Reſervation of the Rent, but that he made the Leaſe as Guardian and Truſtee for the Plaintiffs the Children, and not as Executor, and therefore it cannot be taken as a Diſpoſition as Executor, or Aſſent to a Legacy.

The Lord Keeper decreed for the Plaintiff.

DE
Term. Sanct. Mich.
Anno Regis 35 Car. II.
IN
CANCELLARIA.

S. C. 1 Vern. 189.

Lord Ranelaugh *contra* Hayes.

Covenant to ſave harmleſs decreed.

HAYES covenants to ſave the Lord Ranelaugh harmleſs touching three Parts of a Farm aſſigned to Hayes by the Lord Ranelaugh, & ſue quia damnify. Decreed by the Lord North to ſave harmleſs, and a Maſter to tax Damages: But it was much oppoſed by Mr. Keck, becauſe a Covenant is not to perform any Thing in ſpecie, and a Maſter in Chancery to tax Damages inſtead of a Jury, and the Plaintiff hath Remedy at Law, and not here.

And nota; the Breach aſſigned was, that the Plaintiff was ſued in the Exchequer by the King for Rent, but it was not charged in the Bill here, or proved that the Rent was behind, but only that he was ſued, &c. and objected that this would for every petty Breach ſubject the Defendant to Commitment.

Howard *Vid. con.* Harris & Robert. 6 Nov. 1683.

S. C. 1 Vern. 33.

Mortgage.

THE Bill was against Harris and Robert to redeem two Mortgages made to Harris by Henry Howard late Husband of the Plaintiff, and Brother of H. Heir to Harry; the Bill charges the Mortgages made, and that there were some Agreements for Redemption, if not expressed in the Deeds, yet was to be redeem'd, and charg'd that she was jointressed on Articles made before Marriage, executed after by Reason Howard, the intended Husband, was then an Infant, but at full Age made a Jointure to the Plaintiff, and offers to pay the Money, so she may be admitted to redeem; Robert consents to her Demand; Harris denies the Articles, and sets forth that as to nine Tenements he was a Purchaser for valuable Consideration 1600 l. from Sir Robert Howard, and after two Mortgages made to him, the last Mortgage including the first, and redeemable on Payment of 1000 l. the nine Tenements in Lease for three Lives yet in Being.

The Case came now to be heard, and on the Pleadings and Proof was, viz.

Sir Robert Howard in 1651. by Fine and Deed produced and proved, conveyed the nine Tenements in Reversion after three Lives yet in Being, and whereon 7 l. 10 s. was reserved to Harris and his Heirs. Anno 1665. she (Sir Robert was then dead) married Henry; 1671. Henry, in Consideration of 1000 l. mentioned in the Deed to be paid, conveyed Lurkin and other Lands (the nine Tenements are no Part of these Lands) to the Plaintiff for her Life for her Jointure; (Quære if not for Part of her Jointure) and after in June 1671. conveyed the nine Tenements in Reversion to him in Fee, but not to be redeemed but by Henry and the Heirs Males of his Body, and by no other; which by his Answer he saith was done so, because of the Injury Sir Robert had done him; for now one Berry, then Husband to the Plaintiff, had set on Foot a fraudulent Conveyance made by Sir Robert and his Brothers, whereby Berry pretended that Sir Robert was but Tenant for Life, and so the Conveyance of the nine Tenements was void, which induced Harris to consent, for thereby, viz. by this Mortgage and his Conveyance he still kept Possession, and received the Rents 7 l. 10 s.

Afterwards having his Money 564 l. secured by this Mortgage, Henry Howard had need of more Money, and Harris supplied Henry Howard with 436 l. more, which made the Debt 1000 l. and took a Mortgage Anno 1672. of the same Lands (the nine Tenements in Reversion as aforesaid) and of divers other Lands to him and his Heirs, redeemable only by Henry Howard, and the Heirs Males of his Body, but in this Conveyance (Quære, if not in the former Mortgage also) Henry Howard covenants to pay the Interest duly every half Year, and the 1000 l. in Anno 1686. Afterwards in 1673. Henry Howard conveys Hopsel and Alton, which are the nine Tenements, and divers other Lands, to the Plaintiff for Life for Jointure, the Remainder to himself and the Heirs Males of his Body, or to that Effect, the Remainder over, under which Robert the other Defendant claims; but, as before is said, the Plaintiff till this Conveyance had no Title to the Land in Hopsel, &c. the nine Tenements.

Mortgage redeemable by Mortgagor and Heirs Male. Q. Ante 100.

For the Plaintiff, Mr. Sollicitor, Mr. Keck, and others insisted that both Conveyances being with Power of Redemption by Henry Howard and the Heirs Males of his Body ought in Equity to be not so restrained. A Mortgage can by no Art or Clause be so restrained, but the Mortgagor and his Assigns of the Equity of Redemption or his own Heirs, tho' not of his Body, may redeem, else it would lie in the Power of a Scrivener to make all Mortgages absolute in Effect, and to put a Bar to the Power and Jurisdiction of this Court to relieve in Cases of Mortgage, by inserting such a Clause.

Mr. Keck cited a Precedent 1678. between Killington and Green. The Condition of a Mortgage was to redeem during the Life of the Mortgagor. Decreed that the Heir might redeem.

2dly. The Covenant on Henry Howard his Part to pay the Money and Interest makes it a Mortgage on Harris's Part, and he might sue for the Money, and it cannot be a Mortgage, but it must be a mutual Mortgage equal to both.

On the other Side it was said, that generally it is true, that no Restraints could be put on a Redemption where the Business is only lending of Money by the one, and securing the Money lent by the other; and therefore if the

Case were only that Harris had lent, &c. and Howard had made a Mortgage redeemable by him or his Heirs Male, &c. his Heir general or Assignee might redeem; for securing the Money is the Main of the Business; but this is not the Case as to the nine Tenements; for it is alledged and proved Sir Robert Howard had, long before the Jointure, viz. 1651. absolutely and for a full Consideration by Fine and Deed sold those Lands to the Defendant, viz. the Reversion and Rents 71 l. 10 s. and Harris in Possession of the Rents before and till the Jointure made; and the Consideration of the Mortgage 1672. to him by Henry Howard was the pretendent Title from the Father of Henry. If it had been so plainly said, that for that Reason and because he would only redeem, and so his Heirs Males, it would have been a good Restraint, that he and his Heirs Males might have Liberty to set on Foot his Pretence, but no other. If A. in Breach of Trust vested in him for J. S. should convey the Lands to B. and B. being intitled under a Breach of Trust, conveyed to J. S. on Condition, that he and the Heirs of his Body may redeem. B. died without Issue, shall his collateral Heirs redeem, and so as that J. S. should be forced to convey not only the Interest he hath by the Mortgage, but extinguish his ancient Title? for so it is desired here, that Harris should convey to the Plaintiff, and so lose his former Title, for which he paid so much, and hath no Consideration for it; for his Lending of Money to Howard is no Consideration to Harris to lose his Purchase and his Money which he paid for it.

Again, Harris did really purchase from Sir Robert, it is not alledged or proved how Henry Howard comes to be interested, or what Title Henry Howard had; it is not said so much as in the Bill, that Henry Howard was seised of any Estate in Fee or otherwise, but abrupte that he made such Jointure and Mortgage, and prays the Conveyance, paying the Mortgage-Money.

The Defendant sets forth a Purchase from the Father by Fine for valuable Consideration. Now if you will have a Reconveyance and redeem, you must shew why the Conveyance to the Defendant is not good, by shewing a former Title to the Title of Sir Robert the Conizor of the Fine, or invalidate his Conveyance by some Matter, and not only by Replication aver your Jointure; else if a Man take a Mortgage of his own Lands, and lend Money, he shall lose his Land for his own Money, viz. for nothing.

The

The Objection on the Covenant can press no further than as to the other Lands, where the Defendant's Title is only the Mortgage.

The Portion the Plaintiff brought is but 1000 l. both her Jointures are near 1000 l. per Annum.

Interest on Interest.
Post 153, 206.

The Lord North, Lord Keeper, decreed the Redemption, but on Payment of the Money, and Interest on Interest; and took a Difference where the Covenant is to pay the Interest and where not, for Debt lieth on the Covenant.

S. C. 1 Vern. 195.

Lyford *contra* Coward. 6 Nov. 1683.

Copyhold.
Surrender decreed according to Possession.
See 1 Chan. C. 171, 243.
1 Ch. R. 40, 105.
M. 38, 39.
Ante 94.
Post 174.

THE Bill was for a Decree of certain Copyhold Lands, Parcel of the Manor of Buckeridge in the County of Berks, and his Title is by a Surrender made long since by Richard Lyford, Father of the Defendant Mary, to the Use of his Will, under which Will he claims, because all the Rolls are lost or detained by Blagrave Lord of the Manor, and inforces that the Surrender is to be presumed, because that he had been in Possession 40 Years, and done Suit and Service to the Court as a Copyholder. Blagrave the Lord denies having any Rolls: The Defendant Mary denies both the Surrender and Will, and that she was but three Years old at her Father's Death, whose Heir she is, and since a Feme Covert, and therefore no Laches can be imputed to her, neither in Law nor Equity; and being an Infant did not discover her Title, but lately, being Heir to her Grandfather, who made the Will; and for Trial of her Title hath brought a Plaint in the Nature of a Writ of Ail, as Heir to her Grandfather, viz. Daughter and Heir to Richard, Son and Heir to Richard, who, as is pretended, made the Will and Surrender.

Writ of Ail.

At the Hearing the Plaintiffs made no Proof of the Surrender and Admittance, but proved that he had served several Times as a Copyholder at the Court, and produced a Note under Sir Edward Powel's Hand of a Receipt of Money for his Admittance; but to what Estate he was admitted

mitted, does not appear. It was also insisted on, that the Plaintiff had paid several Legacies given by the Will; but this was but lightly insisted on at this Hearing, (but mainly on the long Possession) because there was Assets enough to pay the Legacies, and the Legacies were personal, nothing at all relating to the Lands.

The Defendant's Counsel answered: The Possession against an Infant and Feme Covert was no concluding Evidence, especially against an Heir, to support a voluntary Conveyance against an Heir at Law, who had but this Land left her, being but 4 l. per Annum. Whereas the Plaintiff had a great Estate from the Grandfather: And insisted that the Bill was founded on Matter meerly triable at Law, whether Will or no Will, Surrender or no Surrender.

Possession no concluding Evidence against an Heir Infant and Feme Covert.

Vide ante 4, 69, 103, 133, 4.

1 Chan. C. 100, 217, &c.

But the Lord Keeper insisting much on the Possession as Ground to make a Decree for the Surrender;

The Defendant's Counsel replied, That by the Statute of 32 H. 8. a Writ of Ail is allowed to be brought upon a Seisin within fifty Years: And tho' in some Cases the Court has decreed Settlements without Trial; yet that was always where the Bill was founded on some Matter of Equity properly and pecutiarly, finally to judge, as where a Trust is built upon a Conveyance, or the like; and the last Judgment is in this Court, which here is not so: And if the Plaintiff thought an inferior Court not capable enough to try the Point, if the Defendant did consent to try it in an Ejectione firmæ, or otherwise as the Court should direct, which is all the Equity the Plaintiffs could have here.

Limitation. Possession.

But the Lord Keeper, tho' much prest to the contrary, decreed the Surrender, and left the Defendant to try Will or no Will.

Ante 134.

Ratcliff

S. C. 1 Vern. 196.

Ratcliff *contra* Graves. 7 Nov. 1683.

An Executor lends and receives Intereſt.
Ante 21, 35, 150.
Poſt 153, 235.
1 Chan. C. 211.

AN Executor liable to Debts and Legacies payable in futuro, and having Money of the Teſtator's in his Hands, lends it at Profit, and receives it and the Profit, or Intereſt thereof. The Debate was, whether he ſhall anſwer the Intereſt he received as Aſſets: Lynch's Caſe, and other Caſes, ante, and the Caſe of Mr. Cartwright in this Court, (where it was decreed, That the Executors ſhould not be charged, and affirmed in an Appeal in Parliament) were cited; and the Reaſon given then, and now given, becauſe the Executor not being bound to lend, &c. if he do lend, it is at his Peril; and if it be by that Occaſion loſt, he ſhall anſwer the ſame out of his own Eſtate: And therefore as he ſhall bear the Loſs, he ſhall have the Gain.

The Lord Keeper remembred Cartwright's Caſe, for he ſaid he did not like that Caſe, for ſaying alſo that when the Executor lent it on Security, he might ſecure himſelf for a ſmall Matter.

Finch Sollicitor. My Lord, the Security ſo taken may fail.

Keck. It hath been taken here as a Rule that the Executor ſhall not be charged.

Yet now the Lord Keeper decreed the Executor ſhould be charged.

Leaſe waiting on the Inheritance, if Aſſets, &c.
Aſſets.
Vide Hardres Rep. accord. by Hale in Sir George Sand's Caſe.
Ante 49.
1 Ch. C. 98.
1 Salk. 154.
2 Vent. 359.
Poſt 207.

Nota, Alſo that this Term he declared, that where a Leaſe for Years is to wait on the Inheritance; That it ſhall be Aſſets as to Debts as well where the Intereſt of the Leaſe is in the Hands of a Stranger, and not in the Owner of the Inheritance, as when it is in the Ceſtuy qui truſt, of the Inheritance, and the Intereſt of the Inheritance in a ſtrange Truſtee.

Nota, Contrary to former Reſolutions.

Lord Ranelagh *contra* Thornhill. 17 Nov. 1683.

S. C. 1 Vern. 203.

Intereſt on Intereſt. Vide ante 150, 152. Poſt 235.

BILL of Review to reverſe a Decree for Money on Account by the Maſter, whoſe Report was decreed: The Error alledged was, that the Maſter had allow'd Intereſt upon Intereſt, for having made a Total of divers Sums paid by Thornhill, and Intereſt for them. The Maſter then added other Sums after paid, and then caſt up the former Total, which was compounded of Intereſt and Principal, and in the latter allows Intereſt for the firſt Total, &c. and the Lord Ranelagh being ſummoned to attend, refuſed or neglected, and moved to be heard; but becauſe not proper to be moved after a Decree, not allowed by Motion, but now directed to be examined and rectified as to that Point, but the Reſt of the Decree to ſtand.

Harding, *and others*, *contra* Marſh, Langley, *and others*. 19 Nov. 1683.

Bankrupt after Diſtribution, and four Months, other Creditors may come in, but muſt not diſturb the former Diſtribution. Ante 72, 136, 139, 143. Poſt 191, 192.

ON Commiſſion againſt Peacock a Bankrupt, ſued out by the Plaintiffs: A Diſtribution was made of 370 l. to the Plaintiffs; after the Plaintiffs in two Suits at Law proſecuted by them, were nonſuited in one, and a Verdict againſt them. Which Suits were to have recovered 600 l. Part of the Bankrupt's Eſtate, and then they exhibited a Bill in Chancery, and there were diſmiſs'd, becauſe, Bankrupt or not, was only triable at Law; then they ſued at Law, and had Judgment, and alſo Execution for 600 l. Then Langley a Creditor prays to be admitted in, and tenders Charges of the Commiſſion, and that he may be admitted to partake in ſo much of the 600 l. and other Eſtate, ultra and beyond what was already diſtributed. The Commiſſioners admit him, and call the Plaintiffs to Account; which they refuſing to do, the Commiſſioners ſue the Plaintiffs on a Covenant which the Plaintiffs had given the Commiſſioners, as is uſual.

The Plaintiffs now ſued to be relieved againſt the Covenant, on two Reaſons:

First, That after the four Months elapsed and Distribution, no Creditor can come in.

Secondly, They had spent in the Suits 900 l.

The Cause was now heard: The Defendant's Counsel argues, that it was true that Langley could not come in to disturb the first Distribution, but might come in for the Residue of which no Distribution was made; for in that the first Creditors had no more Interest than the Defendant, and there are no negative Words in 21 Jac. which makes the Restraint: But as to what is distributed by the precedent Law, 13 Eliz. All Creditors, whether they sue out the Commission or no, might at any Time come into the Commission; for by that Statute each Creditor is to have his Proportion, pro rata, out of the Bankrupt's Estate, which made the Execution of the Statute, in Point of Distribution, uneasy and difficult, because it was hard to find out all the Creditors: And on the other hand, it was too great a Power in the Commissioners by that Law; because the Commissioners might, the next Day after the Commission, or as soon as they pleased, sell and dispose of the whole Estate: To obviate which, 21 Jac. gives Remedy, and the Words in that Statute, (before Distribution) must not be understood of the Estate that is not distributed.

As I was about to argue that Point further, (it having been alledged at the Bar that Langley's Demand was vain) for nothing could come to him if he contributed to the Charge the Plaintiffs had been at; for the Estate to come in, viz. the Residue, would not be beneficial to him, 600 l. only is recovered, out of which 300 l. and 170 l. being deducted, 130 l. remained; and if their Charges in Recovery were allowed, nothing would remain.

But Mr. Keck, of Counsel with the Plaintiffs, acknowledged the Defendant was to come into the Commmission paying the Charge.

The Lord Keeper referred the Account of the Charges to be specially reported by the Master; for Langley insisted that he had born 200 l. in Charge with the Plaintiffs, and is to be but at Charge of the Commission, not of the Suit; for the Recovery is to their own Use, viz. the 470 l. not of unnecessary Suits, where also they failed.

Lampen *contra* Clowbery. 19 Nov. 1683.

Devise.

WIlliam Clowbery by his Will gave 2000 l. to the Defendant; Item to the Daughter of the said O. Clowbery when she shall attain her Age of 21 Years, or be married, which shall first happen, the Sum of 500 l. to be paid her, with Interest. The Testator died, the Daughter Legatee died under Age, unmarried. O. Clowbery her Father, her Administrator, sued and had a Decree for the 500 l. and Interest thereof, to be accounted from the Death of the Testator; and Lampen (against whom the Decree was) being Executor, &c. brings a Bill of Review.

Where on Debate, the Difference was allowed by the Lord Keeper, between a Devise of 500 l. to one to be paid at her Age of twenty-one, or married, there it is due, tho she died before twenty-one; and where 500 l. is devised, if, or when she comes to twenty-one.

The Point being a meer Point in Law, was long debated.

Mr. Solicitor argued, that because Interest is to be paid, therefore the Principal must be due; and said that the Words transposed are 500 l. with Interest, to be paid at twenty-one, had made it plain, and the Interest must be intended for Maintenance of the Child in the Interim.

Econtra it was said, that this is contrary to the Words, which cannot bear that Sense without Violence; and 500 l. and the Interest, are by the Will to be paid at twenty-one, or Marriage, not before twenty-one, &c. And he meant it, that the Interest computed, viz. from his Death, should be paid for her Portion; and this is best suitable, and stands with the Words, and is rational; Mantira, &c. l. 6. c. 14. In Testamentis ratio tacita non debet considerari, sed verba solum spectari debent. Multa possunt movere mentem Testatoris quæ nos latent. Ideo, per divinationem mentis durum est a verbis recedere.

The Lord Keeper once pronounced a Reversal of the Decree; but being much prest, that the Intention of the Testator would be clear in the Proofs, he declared he would suspend the Decree, and hear their Proofs.

——— *contra* Langton. 24 Nov. 1683.

Mortgage.
Ante 49, 152. 115.
1 Vern. 1, 188, 341.

MARY ——— lent 700 l. and took a Mortgage of Land called Sison, for a thousand Years, in the Name of her Brother, and afterwards did purchase the Inheritance in the Name of a third Person, and the Lease was assigned to her; she died Intestate, and her Father took Administration: The Question was touching the Benefit of this Lease; the Heirs to her (her Sisters) claimed as Heirs against the Administratrix.

A Difference was taken at the Bar, viz. that if Mary had been first Purchaser of the Fee, and after purchased a Lease, it should wait on the Inheritance, and the Administrator or Executor should not have or keep it against the Heir; but here the Lease was first in her.

Lease.
Heir.
Executor.

Lord Keeper. There is no Difference in Reason, and therefore dismiss'd the Plaintiff as to this Point; and that the Heirs were to have the Lease to attend the Inheritance.

S. C. 1 Vern. 93.

Wagstaff *contra* Read. 20 Nov. 1683.

Purchaser not hurt in Chancery.
Bankrupt.
Ante 72, 135, 136.
Post 143, 153, 190, &c.

POrtman became Bankrupt, the Commissioners assign his Estate, whereof the Plaintiff made Title to some Goods, and exhibits his Bill against the Defendant to discover the Goods, and their Value, and what and how much he paid for them, because as the Plaintiff charges, they came to the Defendant's Possession after the Bankrupt broke: The Defendant sets forth, that what Goods did ever come to his Hands, he bought of Portman bona fide, for a full and valuable Consideration, nor did not know, nor had any Notice that at the Time of buying until the now Bill, was a Bankrupt, or of any Account of his Bankruptcy, and pleads this Matter against any Discovery.

After long Debate the Lord Keeper seemed to incline, that the Defendant being a Purchaser without Notice, should not be prejudiced by this Court: But on the other Hand, if the Sale were at extream under Value, as for 5 s. or the like, then such a general Plea shall not stand; for then the Plaintiff should be disabled to disprove, and

any Man in the like Case should be protected; therefore let the Defendant set forth what the Goods were, or what he paid for them.

But the Defendant's Counsel objected, that would destroy and prejudice the Purchaser, though he paid the full Value; for if he discovers what he paid, the Commissioners will assign the Money, or if he discover the Goods, the Commissioners will assign them; and so the Court shall be instrumental to wound the Purchaser. If the Plaintiff can help himself at Law by the Aid of the Statute, he may, and the Court will not hinder him, but not aid him here: The Difficulty to avoid this Mischief, on either Side held long Discourse, and at last ended, that the Defendant should answer what and how much he paid; so as the Plaintiff did consent to take no Advantage of the Discovery, but here in this Court, and not at Law: Which the Plaintiff consented unto by his Counsel, and was to subscribe his Consent, with the Register, and then the Defendant was to answer.

Defendant to answer, but Plaintiff not to take Advantage thereof at Common Law. Vide 1 Chan. C. 29, 154.

Osborne *contra* Chapman.

THE Defendant, as Guardian to the Plaintiff's Wife an Infant, had managed her Estate; and on the Treaty of the Plaintiff for the Marriage with the Wife, desired Account, which was given him: Whereon he and his Counsel advised three or four Days, and then 800 l. was found due to the Wife, which the Defendant by three several Bonds secured to the Plaintiff; and the Plaintiff gave a Bond in 1400 l. to the Defendant to release all Accounts to him, after the Marriage which was had, and the Defendant paid the 800 l. according to the Bonds; but the Plaintiff gave no Release, but now sued to have an Account, and Relief against the Bond: But the Defendant insisted that his Agreement to make Release proved by the Bond given by him, and by his Acceptance of the Money secured by three Bonds; after the Marriage was had, he now ought not to have Account.

Account of Profits and vide ante 7, 32, 38, 43.

Lord

Lord Keeper. He accepted of no Money but of what was due to him, and the Account was made before Marriage when he had no Title, and there is no Releale made as there was in the like Case by Baſſet, which bound Baſſet, and the Plaintiff greatly favoured in the Accounts, and the Marriage was but one Year ſince, and the Plaintiff's Purſuit is freſh; therefore anſwer the Bill.

Poſt 160.

Defendant to anſwer, but Plaintiff not to take Advantage thereof at Common Law. Vide 1 Chan. Caſ. 43.

DE
Term. Sanct. Hill.
Anno Regis 35 & 36 Car. II.
IN
CANCELLARIA.

Bonham *contra* Newcombe *& Ux'.* 25 January 1683.

THE former Decree, ut supra, fol. pronounced to be revers'd by the Lord Keeper North on Precedents cited and long debated: But ordered to suspend, &c. and he would hear the Cause ab origine: He disliked also the Entry of the Decree, viz. reciting the Bill and Answer; and reading the Proofs, and hearing Counsel, decreed it a Mortgage; and therefore not stating the Point of Fact, viz. that it appeared thus or thus, &c. And so he did lately in the Case of the Countess of Anglesey.

Hobert *contra* Hobert. 26 January.

THE Suit was to avoid a Conveyance by Fine and Deed to lead the Uses of the Fine Twenty-three Years since, on Supposition of Fraud, purchasing the Fee of the Land for 111 l. worth 60 l. per Annum; the Plaintiff ignorant of the Value, but the Defendant well apprised thereof; and the Plaintiff ignorant also of his Title, which he came to the Notice of after the Fine, The Bill was dismiss'd. Fraud. Release.

The

Ante 158.

The Lord Keeper declared, that if one will seal a Release or other Assurance to one in Possession, for never so unequal Consideration, it shall not be relieved, because of a new Title discovered, unless there be some special Fraud; as if A. having Title, and B. in Possession, B. conveys the Land to A. in Trust for B. and then gets A. to convey the Land to him as in Execution of the Trust, whereby A. extinguisheth his Title, &c.

S. C. 1 Vern. 218.

Holby *contra* Holby.

Dower.
Judgment.
Equality.

THE Defendant recovered Dower against the Plaintiff an Infant; one appeared for the Plaintiff, then Tenant, as her Guardian, being her Grandfather, but Father to the Defendant, then Demandant in the Writ of Dower, and suffered Judgment, for he could do no other; but the Dower was unequally set out by the Sheriff, but the Sheriff not culpable of any Fraud: But great Inequality appearing;

The Lord Keeper declared, that the Plaintiff ought to be therein relieved.

Whereupon a Proposition was made by the Plaintiff's Counsel, that either the Plaintiff should set out the Whole in three several Parts, and the Defendant choose one Part for her third, or if the Defendant would set them out, and they choose two.

Rich *contra* Rich.

London.
Orphans.
Post 170.

IN Debate, agreed by the Counsel, and not denied by the Court, that a Lease for Years waiting on the Inheritance of a Citizen, shall not be reckon'd as a Chattel, to be divided among Children by the Custom.

2dly. It was certified by the Recorder, that if a Citizen convey to a Child Inheritance, tho' it be expressed for Advancement, it bars no Child's Part; but such Child may come in for a Share, &c. with the Rest.

3dly. It was debated, whether if a Citizen marry a Daughter, and give Money with her, and she desire to come in for a Share, whether she shall be admitted if the Father do not in Writing declare her advanced; and the Sum, as in Inds Law temp. E. 6. or whether she shall not come in? Lord

Lord Keeper. I regard no By-law in the Case.

Churchill. The Precedents are many, that unless the Father do declare her advanced, she shall come in: We ground not on any By-Law, but the Custom, which presumes in such Case a full Advancement, unless the contrary appear.

Anonymus. February 1683.

A Bill was exhibited for Discovery; the Defendant pleaded, that he was a Purchaser for valuable Consideration, viz. so much, &c. and that he had no Notice of the Plaintiff's Title, &c.

Plea.
Notice.
Purchaser.
Vide ante 47, 156.
Post 246.
1 Chan. C. 34, 36, &c. ibid.

Ruled by Lord North, that the Plea as to not having Notice by Way of Plea, was not good; but it ought to have been as to the Notice by Way of Answer, and not by Way of Plea, on Debate; but yet that the Defendant being a Purchaser, should not lose by the Formality of Pleading the Benefit of his Plea if he should answer the whole Plea; for if he should answer to the Time of his Purchase, which possibly was in facto, after the Plaintiff's Purchase, (they were indeed both of them Mortgagees) then the Plaintiff might wound him at Law; he should put in a new Plea, and put in the Point of Notic by Way of Answer, or to that Effect was the Order.

Broad *contra* Broad.

A Bill of Review on the Decree was brought to hearing the 22d of Feb. 1683. and the Decree was read, and Objections made against it.

Decree.
Form of Entring.
A Decree.
Vide post 227, 248.

1st. That the Decree was founded on a Trust, arising on an Agreement by the Husband; but the Decree mentioned no such Agreement, but recites it in Recital of the Plaintiff's Bill, and then proceeds to recite the Answer, and then proceeds to the Decree on this Manner: Whereupon and reading the Proofs, the Court decreed the Trust and Redemption, but doth not say that such Agreement was proved: Therefore the Plaintiff's Counsel insisted, that the Decree was made on the Bill and Answer.

Mr. Solicitor and others said, that it was the Course, and a hundred Decrees were so; and when it is said on reading the Proofs, it is decreed, it is intended that the Matters put in Issue are proved.

But econtra it was said, that a Decree ought to be grounded on Fact, ex facto jus oritur, and else by the Clerks Course the Defendants should be bar'd of a Review in all Cases; for the Plaintiff in Bill of Review cannot alledge Matter of Fact contrary to what is stated in the Decree to be proved; and it may be many Issues are joined in the Bill and Answer; if this Course should hold, all must be admitted, and no Man can truly know on what Fact or Case the Decree was made, nor any Appeal brought.

The Lord North declared accordingly, and was clear of Opinion, that it was not enough to say (on reading the Proofs) it is decreed, but on reading the Proofs, it appeared thus and thus, and therefore decreed, &c. And on this Reason said, that he took no Notice of the Agreement; but yet affirmed the Decree, because when the Wife joines in the Fine, sur concessit, of her Jointure, in order to a Mortgage or Security, it was not an absolute Departing with her Interest; but there resulted a Trust for her when the Security or Mortgage is paid, to have her Estate again, as if it had been a Mortgage on Condition, and the Money paid at the Day.

DE
Term. Sanct. Trin.
Anno Regis 36 Car. II.
IN
CANCELLARIA.

Anonymus.

Sequestration against an Infant Lord for not appearing.

Sequestrations, vide 1 Chan. C. 92, 221, 222, 241. Ante 44, 45, 46.

Sequestrators receive Rent.

SIR John Churchill shewed that a Sequestration for Non-appearance was issued against the Lord Mohun, an Infant of seven Years: Several ill and beggarly Fellows as Sequestrators, by Colour thereof, received the Rents of the Lord Angleſey, and certified the Demand of Payment of others; A. B. C. &c. Tenants, who refuſed to pay their Rents; whereupon an Injunction issued against A. B. C. &c. to pay their Rents to the Sequestrators, and some Tenants were imprisoned, of which he complained, and said, the Lord Angleſey present in Court, the Tenants dwelt in Cornwall, and it were hard they should be forced to come to London. At last the Lord Angleſey offered to appear for them; and if so, and the Contempt in the Tenants did not appear, Cost to be awarded.

Nota; The Process of Injunction was not against Tenants of the Lord Mohun, but A. B. C. &c. by Name.

Infant ſent for into Court. Poſt 167.

Sir John Churchill ſaid a Meſſenger of the Court ſhould be ſent to bring in the Infant, and when he comes in, the Court ſhall or may aſſign one of the Six Clerks as a Guardian to appear and anſwer, &c.

See 1 Chan. C. 157, 257. Ante 137, 138. Poſt 199, 211, 245.

Lord Keeper. How will that look in the Lords Houſe, that an Infant Peer ſhall put the Defence of all his Eſtate in a Six Clerk, who knows nothing, and cannot be informed by the Infant of his Eſtate, &c. At Common Law the Parol was to demur, and the Infant is not bound to anſwer till full Age: And Execution of a Judgment for Debt againſt the Anceſtor cannot be againſt the Infant Heir; and by Act of Parliament the Execution of a Statute is not againſt an Infant, for the Regiſter, Parliament and Common Law gave no Execution againſt an Infant Heir, altho' the Debt were clear and indiſputable, viz. Judgment, or by Statute.

Yet econtra is done in Chancery. Q.

Hatton *contra* Gray. 14 June 1684.

Agreement by Note tho' ſigned but by one, yet good. Ante 136, 143. 1 Chan. C. 42, 85, 209, 302.

HAtton ſold Houſes to Gray for 2000 l. Note was made by Hatton of the Agreement, ſigned by Gray but not by Hatton.

Mr. Sollicitor. The Note binds not him who ſigned it not, for the Statute of Frauds and Perjuries, &c. and therefore in Equity cannot bind the other Party, for both muſt be bound, or neither of them in Equity.

But decreed contrary.

Anonymus. 1684.

Mortgagor borrows more Money by Bond, the Heir ſhall not redeem without paying it. Ante 23, 98. Max. Eq. 2. 2 Chan. R. 247.

MOrtgagor borrows more Money of the Mortgagee, and gives Bond for it; the Heir of the Mortgagor ſhall not redeem without alſo paying the Debt by Bond, if that the Mortgagor bound himſelf and his Heirs in the Bond.

3 Sal. 84. 1 Vern. 262, 244, 245.

East-India Company *contra* Interlopers.

S.C. 1 Vern. 127. Pollexf. Rep.

29 June 1685.

Injunction to ſtop Merchant-Ships. Ante 15, 93. Poſt 203, 204. 1 Chan. C. 75, 80, &c. and the Caſes there cited. 1 Vern. 275, 6. M. 31.

THE East-India Company had a Verdict againſt Interlopers, who in Breach of the Charter traded; but the Company not being otherwiſe able to diſcover the Particulars of the Commodities, &c. and Damages, exhibited a Bill of Diſcovery: To which the Defendants gave inſufficient Anſwers, and ſo reported by the Maſter; and the Plaintiffs Title being found good at Law, and that their Patents were good in Law to exclude others from trading into thoſe Parts, they now prayed an Injunction againſt the Defendants, to ſtop certain Ships which the Defendants were ſetting forth to thoſe Parts, to trade in further Breach of the Patents: And ſo the like was done formerly in Caſe of the Printers for Importing Bibles.

Vide ante 76, 93. Stationers Caſe.

No Injunction to ſtop trading.

Lord Keeper. The Caſe is of a great Conſequence, if it be to ſtop Actions on inſufficient Anſwers, but to forbid plowing or trading, or the like, I cannot, but will adviſe.

Bond & Ux' *Adminiſtratrix of* Elizabeth, *Daughter of* Mary *the former Wife of* Thomas Brown.

The Caſe.

Portion given to be paid at 21, or Marriage. The Daughter dieth, her Adminiſtratrix ſueth. See 1 Chan. C. 60, &c. ibid.

JOHN Brown, the Great Grandfather of Elizabeth, John her Grandfather, and Thomas her Father; Thomas was ſeiſed of the Lands, &c. in Queſtion; and they all by Fine and Recovery ſettled the Lands in Queſtion to the Uſe of Thomas for Life, the Remainder to Mary for Life for her Jointure, Remainder to Stulford and other Defendants, for 99 Years, the Remainder to the Iſſue Male of Thomas in Tail, Remainder to Geo. Brown in Tail, &c. The Settlement was in Conſideration of Marriage of Thomas with Mary the Plaintiff, and 2000 l. Portion. George Brown, on whom the Remainder was ſettled, was a remote Kinſman, viz. Son of George the Son of John, Father of Thomas. The Marriage took Effect, and the Portion paid.

The Term was by the ſame Deed, which declar'd the Uſes, declar'd to be to raiſe out of the Premiſſes 2000 l. for the Daughter and Daughters of Thomas by Mary, and Maintenances

tenances yearly not exceeding 20 l. per Annum, if one Daughter 2000 l. and if any Daughter died, the Survivors or Survivor, if more Daughters than one, to have the Part of the Daughters dying: viz. If Thomas die without Issue Male, or having such Issue Male by Mary, if such Issue should die in Minority or unmarried, the Trustees should out of the Premisses raise and levy 2000 l. for the Portion and Portions of such Daughter and Daughters, together with a competent yearly Maintenance for every such Daughter and Daughters, not exceeding 20 l. per Ann. and the 2000 l. to be paid at twenty-one Years or Marriage, which should first happen. Proviso, If the said Thomas Brown in his Life-time, or any to whom the immediate Remainder, &c. should appertain, should within twelve Months next after the Death of the said Thomas Brown, without Issue Male by the said Mary, either pay or secure the same, and the said Maintenance to the Liking of the said Trustees, then the said Term to cease. Thomas died, having a Son, who died without Issue; Elizabeth his Sister then living, and many Years after, till she was nineteen Years old, and then died: Mary the Mother took Administration to Elizabeth, and the Bill was to have the 2000 l. and the 20 l. for so many Years as Elizabeth lived, for George in Remainder had entred and received the Profits, but not paid the 20 l. nor maintained Elizabeth.

The Lord Keeper decreed for the Plaintiff as to the Maintenance, notwithstanding that her Grandfather John had by his Will given the said Elizabeth 2000 l. to as she needed not Maintenance; but as to the 2000 l. dismiss'd the Bill.

DE
Term. Sanct. Mich.
Anno Regis 36 Car. II.
IN
CANCELLARIA.

Whitmore *contra Lord* Craven, *& al'.* December 1685.

Will. Executor. Vide poſt 236.

WIlliam Whitmore having Iſſue only one Son, made his Will in Writing, and thereby deviſes ſeveral Legacies; and after wills in this Manner, viz.

The Surpluſage of my Perſonal Eſtate, my Debts, Legacies, and Funeral Charges being paid and ſatisfied, I give unto the Right Honourable **William** Earl of Craven, for the Uſe of my only Son **William Whitmore**, and his Heirs lawfully deſcended from his Body; and for the Uſe of the Iſſue Male and Iſſue Female, deſcended from the Bodies of my Siſters **Elizabeth Weld** deceaſed, **Margaret Rymiſh** and **Anne Robinſon**; in Caſe that my only Son **William Whitmore** ſhould deceaſe in his Minority without having Iſſue lawfully deſcended from his Body, I nominate and appoint my only Son **William Whitmore** Executor of my laſt Will and Teſtament; I nominate and appoint the Right Honourable **William** Earl of **Craven**, during the Minority of my only Son **William Whitmore**, Executor of my laſt Will and Teſtament. And commends and commits the Education and Tuition of his Son to the Care of the ſaid Earl.

In

In the Year 1678. the Teſtator died, his Son being then about the Age of thirteen Years. The Earl of Craven proved the Will and paid the Legacies; and the Reſidue of his Perſonal Eſtate conſiſted for the moſt part in Cattle, Houſhold Goods, Plate, Jewels, Arreays of Rent, and Debts upon Bond; the Mortgages being not conſiderable.

William Whitmore the Son is lately dead without Iſſue, being above the Age of eighteen Years, and under the Age of nineteen, and had never taken upon him the Executorſhip to his Father.

That William Whitmore the Son a little before his Death, made his Will in Writing, and thereby deviſed to his Wife all his Eſtate, real and perſonal, and what elſe he could give her, and makes her Executrix.

The Widow ſues for the Eſtate and Surpluſage; the Siſter's Children exhibit a Croſs Bill for it: Dec. 1685. both were heard.

The Queſtions were two:

Term. Remainder. Deviſe. Vide poſt 236.

1ſt. Whether the Deviſe of the Surplus to the Uſe of the Children in Caſe that William the Son did take Effect, is good in Law? Becauſe it is to them in Caſe William die without Heirs of his Body during his Minority; for the Defendant pretended that tho' a Term or a Chattel given to one, and the Heirs of his Body; and if he die without Heirs of his Body, yet when it is ſo given on a Contingency to happen in a ſhort Time, and which is to happen at fartheſt on the Death of one Perſon, it is good that the Intention of the Will may be perform'd; and Maſlingbord's Caſe and that of the Duke of Norfolk cited. But econtra it was ſaid, That tho' that may be true in Caſe of a Chattel real, it cannot be in Caſe of Money, or perſonal Chattels, which once veſted, (as here in William the Son) can never be deveſted, never any ſuch Precedent was, or can be; the Inconvenience would be great, and in the Caſe of Term or Chattel real, it was long e're it was allow'd, and the Uſe of Money is the Money it ſelf.

At what Age an Infant ſhall be an Executor. 1 Chan. C. 156.

2dly. For the Plaintiff, that if it be a good Deviſe, yet the Contingency never happened; for William muſt die during his Minority, or elſe the Defendant can have nothing, and Minority is not 21, but 17 in Caſe of Executorſhip; and Minority in the 1ſt Part of the Will is of the ſame Senſe as the Word Minority is in the latter Part; the ſame Word in

the ſame Will is of the ſame Senſe; and the rather becauſe the Executorſhip of the Lord Craven being but during the Minority of William, the Executor ceaſeth when William comes out of his Minority as Executor: William is firſt named Executor, and then the Lord Craven is made Executor during the Minority of William; that is, while he comes to be of ſeventeen Years of Age, and then the Lord Craven hath no more to do. William can ſell, alien, (yea) and deviſe his own Eſtate by Will; the Lord Craven's Intereſt of Executorſhip ceaſeth.

Infant Executor, &c. Vide ante 53, 151, 164. 1 Chan. C. 156, &c. ibid.

The Lord Chancellor decreed accordingly, and put the Caſe as if the Clauſe of Executorſhip had been in the firſt place, and Lord Craven named Executor during the Minority of William; and then if William die during his Minority, the Reſidue to the Children, it were without Queſtion, and the Property at ſeventeen veſted in William, and cannot be deveſted; and ſaid that if the Caſe had been of ſmall Value, it had indured no Debate, but now ſix Counſel of each Side have ſpoken.

DE
Term. Sanct. Hill.
Anno Regis 1 Jac. II.
IN
CANCELLARIA.

Newdigate *contra* Johnſon.

Account.
London.
Ante 160.

THE Plea of an Account of an Orphan's Eſtate before the Aldermen of London was diſallowed, and a Surcharge allowed to be made thereon by the Lord Chancellor; who ſaid when he was Recorder of London, he obſerved well the Manner of their taking ſuch Accounts: He alſo decreed that the Executor pay Intereſt at 6 l. per Cent. for the Money he had not paid into the Chamber till he paid it in, tho' the Chamber uſually takes but 5 l. per Cent.

Intereſt.

Greſwold *contra* Marſham. *Eodem die.*

Mortgage.
Loſs.
Notice.

THere was due to Marſham 4000 l. upon a Mortgage made to him of Lands: The Mortgagor after the Mortgage acknowledged three Judgments to other Perſons for other Monies due; two of thoſe Perſons to whom the Judgments were given, gave Notice to Mr. Marſham of their Judgments, and deſired him to accept of his Money that was due upon the Mortgage, which they ſaid they were ready to pay him, and deſired him to appoint a Time when, and they would pay him his Money within a Fortnight, to the Intent that his Mortgage being ſet aſide they

might take Execution on their Judgments, but proved not any Money actually tendered: But afterwards Marsham exhibited a Bill against the Mortgagor, and had a Decree to foreclose him of Redemption; and afterwards took a further absolute Conveyance from the Mortgagor, for a considerable Sum of Money; and now the two Creditors had a Decree against Marsham to pay them their Money; but Powel the third Creditor had no Relief, because he gave no Notice in Time of his Judgment.

Notice.
Vide ante 47, 48, 122, 126, 161.
Post 246.

Comyns *contra* Comyns. *Eodem die.*

The Case was.

SEveral Legatees by Will, of Sums of Money in Numero, others in Specie; the Estate would not pay all, the Question was, Whether the Loss should fall only on the Legatees in Numero, or whether the Specifick Legatees should contribute proportionably?

Loss.
Legacies.
Contribution.
See 1 Chan. C. 136, 149, &c.
Ante 124, 171.

The Lord Chancellor was strongly of Opinion they ought to contribute; for he said that the Intention of the Testator was as much that one should have all the Money, as the other should have the whole Specifick Legacy; and put the Case, suppose three Specifick Legacies be one House, &c. and there is not sufficient to discharge them all by Reason of Debts, what shall be done there?

Econtra. It was objected that the Practice of the Civil Law, and of this Court, had been otherwise.

Chancellor. See Precedents.

Quære, In Case there be three Legatees, each to have a House, but particularly A. the Black House, &c. and so to the Rest, and the Debts so diminish the Estate that the Houses cannot be delivered.

Quære, If there be not a Difference in such Case, if the Legacies were particular, viz. the Black House to A. the White to B. &c.

S. C. 1 Vern. 179.

Bodmin *contra* Vandebenden.

A Jointress claims Dower, &c. 1 Chan. C. 272. Vide ante 23, 28, 87, &c.

THE Cause came again to be heard before the Lord Chancellor, and after long Debate decreed for the Plaintiff, against the Lease for Years and an old Statute, which Vandebenden had bought in: For the Lord Chancellor said he could not imagine why a Jointress should be relieved against such a Lease, and not the Widow who hath Dower; the Jointress comes in by Contract and Act of the Party; the Dower is by Act of Law grounded on Marriage, the Act of both Parties: The Wife in that Case is by Law more favoured than the Heir, and the Heir should be relieved; as if a Lease be made in Trust to pay Debts, the Lessor dieth, the Heir paying the Debts shall be relieved against the Lease, and set it aside; and why not the Wife? I can see no Reason for it: And Vandebenden could not but have Notice that the Lord Bodmin was married, when also Vandebenden had a Statute of 10000l. from the Lord Bodmin: But the Defeazance thereof appeared not.

Some of the Counsel insisted on it as a strong Proof, that Vandebenden had Abatement in Respect of the Plaintiff's Possibility of Title: Others insisted that a Lease being created by the same Settlement, by which the Inheritance was settled only on a particular Purpose, and then to wait on the Inheritance, shall be never applied to other Purpose in Equity, but is as a Non ens: Others pressed, that the Wife for her Dower is in Law in the Per, by her Husband, and shall be intitled to clear all Incumbrances, as well, and more than the Husband.

Nota; The Wife had not Dower executed, for the Judgment in Dower was with a Cesset Executio during the Term.

Dominus Ward *contra Dominum* Meath.
1 March 1685.

A Bill was exhibited in Chancery against the Husband and Wife for Lands in Ireland: The Husband appeared for himself, but departed without making Answer; upon which Process continued against him to a Serjeant at Arms, and now, the first of March 1685. the Plaintiff prest for a Decree against the Husband and Wife pro confesso. In the Interim pending the Process against the Husband, the Wife got an Order to appear and answer; and did answer, setting forth a Title to her self of the Inheritance, and therefore no Decree could be against her. The Court decreed the Bill pro confesso against the Husband only, that he account for all the Profits of the Land received since the Coverture, and the Profits which shall be received during the Coverture, &c.

Baron and Feme. 1 Chan. C. 27, 296, &c. Wife answer without the Husband. Vide ante 39, 191.

Process.

Decree pro confesso against the Husband. Vide post 237, &c. ibid.

Hutchins pro Def. What if it appear upon hearing of the Wife, that she hath a Title?

Keck. We cannot proceed against the Wife, for her Answer is no Answer, being made without the Husband's Answer.

Wife's Answer no Answer without her Husband. Ante 39, 101. 1 Chan. C. 194, 225, 296.

Note; By the Proceedings in this Cause no Decree can ever be had against a Feme Covert for her Inheritance, if the Husband will not appear.

Mr. Solicitor, Who was a Counsel for the Defendant, upon reading of this Report to him, told me that the Defendant never did appear; but a Commission being taken out for the Husband and Wife to appear, it was taken by the Court as if he had appeared, though it was never executed for him.

Resp. Quære, For an Essoin, or an Original Writ cast or taken out in the Name of a Party, is no Error, &c.

Barker

Barker *contra* Turner. 5 March 1685.

The Case.

Copyhold.
Vide ante 94, 130, 151.
1 Chan. C. 171, 243.

A Copyholder to him, and the Heirs Male of his Body, purchased the Fee-simple to him and his Heirs; and afterwards for a valuable Consideration, viz. 300 l. sold the Land, and conveyed it to the Defendant, who was in Possession divers Years. The Copyholder died, leaving Issue a Son, a special Verdict was found at Common Law; the Question being, whether the Son hath Right or no?

Now the Lord Chancellor was of Opinion for the Purchaser, and that the Conveyance was good against the Heir; for the Copyhold being severed from the Manor, there is no Means to bar it; but by Conveyance at Common Law, the Intail is not within the Statute of Westminster the second.

But the Lord Chancellor took Time to advise.

DE
Termino Paſchæ,
Anno Regis 2 Jac. II.
IN
CANCELLARIA.

Holley *contra* Weeden. 1686.

S. C. 1 Vern. 400.

THomas Caſtle, Anno 1657. borrowed of the Plaintiff ſeveral Sums, viz. 200 l. and bound him and his Heirs by Bond for Payment, and died ſeiſed of the Lands in Fee; which deſcended to his Daughter, and on her Death without Iſſue, to the Defendant Robert, and he entred, the Money being unpaid. The Plaintiff, Mich. the 16th of Car. 2. filed a Bill againſt Robert, as Heir, who pleaded riens per deſcent, and Verdict againſt him at Norfolk Aſſizes; but before the Day in Bank Robert died, ſo as the Plaintiff could not have Judgment. Robert left Robert an Infant, his Son and Heir.

Heir pleads a falſe Plea.

Then, Trin. 31 Car. 2. the Plaintiff filed an Original againſt the Infant in the Common Bank; and Michaelmas laſt Robert the Infant coming of Age, the Plaintiff declares againſt him on the two Bonds, who pleaded riens per deſcenſum die Brevis, and Iſſue was joined.

The Defendant pretends that Robert the Father by his Will deviſed the Lands to the Defendant Weeden, &c. a little before his Death.

The

The Plaintiff exhibits his Bill to be relieved againſt the Will, and preſſed that he ought to be relieved, for the Lands were liable in Law to his Debt; and the Plaintiff while they were ſo liable, did do all the Law required in ſuing Robert while he was ſeiſed of the Lands by Deſcent, and renewing the Suit againſt the Infant, and muſt have had Judgment againſt Robert if the Act of God, viz. the Death of Robert had not prevented it; and it is not Reaſon that a falſe Plea ſhould advantage and profit himſelf. Parker and Dee's Caſe. And if the Suit had abated by other Occaſion, yet in a Writ by Journey's Account, though Robert, had alienes the Land on valuable Conſiderations; yet the Land had been liable, and by the Suit attached, Robert is diſabled by Act executed, (Feoffment, Fine or otherwiſe) to diſcharge the Land any more by his Will.

The Lord Chancellor diſmiſs'd the Bill.

S. C. 1 Vern. 412.

Drury *contra* Hooke. 1686.

Brokage.
Bond.
Vide poſt 241.
1 Chan. C. 276, &c. ibid.

THE Plaintiff gave a Bond to the Defendant, conditioned in Effect, that if the Plaintiff married A. S. then the Plaintiff to pay a certain Sum of Money.

A. S. was a young Gentlewoman, and had 2000 l. Portion; and the Plaintiff being about Sixty Years of Age, and having Seven Children, made Uſe of the Defendant to procure the Marriage; and he did it, and put the Bond in Suit; the Bill was to be reliev'd againſt the Bond.

Mr. Finch and others for the Plaintiff, preſt the great Inconvenience of ſuch Brokage, eſpecially in the Caſe of young Perſons, and it were prejudicial to the young Woman.

Serjeant Rawlinſon and others econtra. We are Defendants not Plaintiffs, and the Bond is good at Law; and in the Caſe between Creſſey and Crooke, the Court gave no Relief in the ſame Caſe: Which was, that the Lady Shipdain, being a rich Widow, lodged

in Crooke's Houſe, and Creſſey agreed with Crooke, that if he could get him Acceſs to the Lady, he would give him a Sum of Money if he married her, and gave Bond to pay it: The Marriage proceeded, Crooke put the Bond in Suit: Creſſey ſued in Chancery to be relieved, and was diſmiſt.

Lord Chancellor. Great Difference of a Widow Forty-five Years of Age, and a young Maiden that has no Friends to adviſe her; and therefore decreed for the Plaintiff.

Such Bonds are of very ill Conſequence.

See 1 Chan. C. 276. and the Caſes there cited.

DE
Term. Sanct. Mich.
Anno Regis 2 Jac. II.
IN
CANCELLARIA.

See 1 Chan. C. 276. and the Cases there cited.

Attorney General *contra* Ryder. 12 Octob. 1686.

Legatees. See 1 Chan. C. 80, 192.

SIX hundred Pounds were deviſed for Ejected Miniſters: It was urged,

First, The King had Diſpoſal of the Money.

Secondly, A Legatee, where there were many Legatees, ſued for his Legacy.

The Executor ſets forth, that there were divers other Legatees, and that there was not ſufficient Aſſets to pay all; and therefore inſiſted, that the other Legatees might be Parties, that they might come into the Account and abate equally, elſe the Executor ſhould be put to divers Accounts, and the Account with one will not bind the reſt.

1 Chan. C. 149, 257.

But to that the Lord Chancellor regarded not.

Thirdly, The Executor ſets forth a Revocation of the Will, by which the Legacy was given.

Will under Probate Eccleſiaſtical, not triable here. Vide 1 Chan. C. 80, 126, 192.

Lord Chancellor. The Will is under Probate Eccleſiaſtical, and I will not try it here: Go to the Eccleſiaſtical Court, and prove it (i. e. the Revocation) there.

Burton *contra* —— 29 October.

Second Report.

ORdered that a Report made in the Cause, be referred back, but the Defendant to pay Costs if he changed not the Report considerably; but no Time being prefixed in that Order for the Master to report, by a subsequent Order the Report was to be made by the Third of November. The Master was attended several Times, and a few Days before the Third of November gave a Certificate that he was ready to report, but by Reason of its Length and Schedules of Particulars, he could not finish it within the Time; and without further Order for further Time, did finish his Report, which was done four or five Days after the Third of November: The Draught of which Report the Plaintiff perused, and the Report was filed: The first Report and the second differed 3700l. so that the Report was to the Advantage of the Defendant 3700l. &c. but the Plaintiff proceeded to the Hearing of the Cause; and the second Report being made out of Time, viz. after the Time elapsed for the making thereof, the same was disallowed, and the first Report decreed. But if the Defendant would bring into Court the Money first reported, the second Report should be considered. And the Plaintiff got Costs taxed to 140l. or thereabouts: And now the Defendant moved, that he being also but a Trustee, might be discharged of the Costs, which were not settled by the Decree, but imposed only as a Penalty in Case he caused the Plaintiff to travel in the Report without just Cause, which he had not done, as appeared by the Report.

Report made out of Time, disallowed.
Ante 22, 23.

The Lord Chancellor disallowed the Motion, and ordered the Cost, unless the Defendant would bring the Money first reported into Court, and shewed much Displeasure against the Master for making and filing the Report without Warrant expressing, as if it had not been gain'd Gratis.

S. C. 1 Vern. 57, 122. Ante 82.

Lady Harvey *Defendant, at the Suit of* Thomas Harvey, *Executor to* John Harvey, *her late Husband.*

The Case was, viz.

Parol Agreement againſt Truſt by Deed.

THere was a Marriage agreed to be between them; ſhe brought him a great Perſonal Eſtate, value 30000l. and ſhe was ſeiſed of Lands of the yearly Value of 1200l. or more, and his Land about 800l. per Annum; and both were agreed to be ſettled for their Lives on them, Remainder in Tail Male to their Sons, and the Fee-ſimple of her Lands in Default of the Iſſue Male, as ſhe ſhould appoint, &c. and in Default of ſuch Appointment, to him and his Heirs, for that there had been long Love, &c. between them. Sir John Coel was indifferent Counſel to draw up the Conveyances; and when John Harvey came to Sir John Coel, he then took Notice that if the Lady's Land ſhould be ſettled as aforeſaid, then the ſame would be obnoxious to Sequeſtration: For John Harvey had been in Arms for King Charles, and at that very Time was ſecretly engaged in a Plot for the King; thereupon he conſulted with Sir John Coel how to avoid that Miſchief: Who thereupon adviſed, and drew up the Settlement with a precedent Intereſt and Eſtate for Years to be in Truſtees: In truſt that the Truſtees, their Executors, &c. ſhould diſpoſe of all the Rents and Profits of the Lady's ſaid Land from Time to Time, as ſhe alone ſhould without her Husband diſpoſe, and to ſuch Perſons as ſhe alone ſhould direct; and with a Covenant by John Harvey, his Executors, &c. for Performance.

Accordingly it was done, the Marriage took effect, and they lived about Twenty Years: John Harvey, in Preſence of his Wife, made his Will, and acquainted her therewith; whereby he gave her all his Jewels, and 20000l. to be laid out in Land, and his Wife to be eſtated therein for Life, and gave her other Legacies; but made the Plaintiff Thomas his Executor, and gave to him the Reſidue of all his Perſonal Eſtate, and died.

Some time after his Death Differences arose between the Lady and Thomas the Executor: The Matter was, viz.

John the Husband and his Wife living so long together, he, notwithstanding the said Trust excluding him from the Profits, and his Covenant, did constantly take all the Profits, and disposed of them in House-keeping, and otherwise as he pleased, and they both made Leases to Tenants without the Trustees; but now the Lady upon the Covenant would have Account and Satisfaction for the Profits received by her Husband from the Plaintiff, who exhibits this Bill to be relieved against the Covenant, for that the Lease for Years was made only to protect the Wife's Estate against the Violence of those Times, and not to exclude the Husband, but the Sequestrators: And in Proof hereof, Sir John Coel, who was a Master in Chancery many Years, and of a very clear Reputation, did fully depose thereto; and the Change of the first intended Settlement was by the Appointment only of John Harvey; and though his Testimony was single, the Nature of the Case required Secrecy, and the subsequent Perception of the Profits without Complaint or Interruption by her or the Trustees, and Leases aforesaid, and the Testimony of a Woman that the Lady had expressly affirmed she had not made any such, (but this Testimony of the Woman was not much insisted on by the Plaintiff's Counsel or the Court;) but there were some other Settlements of Personal Estate to the like Purpose to have been made, which were never made nor insisted on to be made; because Cromwell shortly after dying, then John Harvey thought himself out of the Danger. But on the contrary, it was very full and at large insisted on, that against Conveyances by Fine and Deed on Consideration of Marriage, and so great Portion, and settled by Advice of Counsel, the Court might not relieve against a Trust express in a Deed indented; and how dangerous such a Precedent would be, and the Silence of the Lady not interrupting or complaining of the Taking of the Profits during her Husband's Life was not considerable; for it may be that she was not willing to displease him, and she knew her Husband had a great Estate to leave, and hath left sufficiently to satisfy her of the Covenant; on which she desired nothing in this Court, but would take her Remedy at Law, which she hoped that the Court would not hinder, and not let it be in the Power of any single Person of what Credit or

or Reputation ſoever he be of, againſt a Settlement by Deed, Fine, Conſideration.

But on this Point chiefly the Court decreed for the Plaintiff againſt the Widow, and ſo did Sir Harbottle Grimſtone do before; and on re-hearing of that Decree, it was affirmed by the Lord Finch; and now on a third Hearing confirmed by the Lord Chancellor Jefferies.

There was another Matter moved and inſiſted on, viz. If in ſuch Caſe of Separate Maintenance, the Wife permit the Husband ſtill to receive and ſpend, poſſibly in her Maintenance, that the Executor of the Husband after his Death ſhould be put to account.

But I obſerved not that the Lord Chancellor now grounded his Decree on that.

S. C. 1 Vern. 349. Poſt 186.

Hale *Executor of* Roſe Hale *contra* Anthony Thomas. Novemb.

Judgment on Bond.

SIR Anthony Thomas, and Samuel his Son and Heir apparent, were bound to Roſe Hale, Anno 1637. each of them and their Heirs in 2000l. to pay Roſe Hale 1300l. at Days ſhortly afterwards, which was not paid; whereupon Hale the Plaintiff, as Executor of Roſe Hale, obtained Judgment on the Bond for 2000l. and 12l. Damages and Coſts againſt Samuel, and by Bill in Chancery againſt Anthony the Defendant, Brother and Heir of Samuel, ſetting forth that Samuel had died ſeiſed in Fee-ſimple, but that Anthony the Defendant had purchaſed in Truſt for himſelf, a precedent Statute made to one Dagnall, which was ſatisfied in Equity by Perception of Profits. Anthony ſets forth by his Anſwer an Intail made by his Grandfather, and deſcended to him, and denied that Dagnall's Statute was ſatisfied. As touching the Intail a Trial at Bar was directed; and that the Defendant ſhould not give in Evidence the Statute; and a Verdict was for the Plaintiff againſt the Intail.

And as touching the Statute the Plaintiff moved, that the Defendant might either purchaſe and ſatisfy the Plaintiff's Judgment, or to account before a Maſter whether ſatisfied or not, on Penalty to pay Coſts of the Suit, in Caſe that the Statute were ſatisfied. The Maſter reports the Statute ſatisfied, and 4000l. more, viz. 1400l. by Sale of

Lands, and the rest by Perception of Profits; and decreed that the Plaintiff should proceed at Law.

The Costs were paid, and Liberty given him to enter Judgment on the Verdict.

The Plaintiff took out a Scire facias in the Common Pleas, and hath there Judgment to take Execution; which he accordingly did on the first Judgment by Elegit, and extends Lands and Houses of the true yearly Value of 350l. per Annum, by the Extent of 40l. per Annum.

The Defendant on Affidavit of this, moves in Common Pleas to stay the filing of this unreasonable Extent; which the Plaintiff opposed, because that now his Debt and Damages amounted to 5 or 6000l. and could not be satisfied by an ordinary Extent for 2012l.

Thereupon the Defendant brought into Court Money in Bags; (viz.) The 2012l. and prayed a Stay of the Extent, according to the Books 16 H. 7. and other Authorities; for the Law provides for the Plaintiff, that the Extent at too low Value shall not be obtruded on him, for in that Case he may pray that the Extenders shall pay him his Money, and hold the Lands extended at the extended Value, which they must do, and shall: And on the other hand, if the Extents be too low, the Defendant hath his Remedy by Tender of the Money to stay the Extent, which by the Laws and Authorities of the Books he may do before the Extent filed, and so Stay the Extent; or after the Extent at any Time, he may tender so much as remaineth to be levied by or according to the Extent, and compel the Plaintiff to receive it; and the Extent shall thereon cease, and be discharged, and a Scire facias lieth in that Case; and for that Reason the Defendant hath no Remedy against the Extent, when once filed, but by that Course; and therefore the Defendant, now when the Money lay in Court, prayed that the Extent might be stayed, and the Plaintiff receive the 2012. The Court was satisfied that the Extent ought to be stayed, but would not adjudge the Plaintiff to receive it; but left that for the Plaintiff to do what he would.

Thereupon the Defendant took out a Scire facias against the Plaintiff, to shew Cause why he should not receive the 2012l. and the Extent be stayed: To which (Writ being served) the Plaintiff appeared not, and Judgment thereupon given in Communi Banco, that the Land be discharg'd of any Extent.

But

But then the Plaintiff petitioned the Lord Chancellor, that the Cause might be rehear'd in Chancery on the Original Bill, setting forth in his Petition the Master's Report, and the Stop of his Extent upon this Judgment; and now the Cause came to be heard accordingly.

Mich. Term. 2 Jac. 2. Serjeants Rawlinson and Hutchins, and Mr. Finch, Mr. North, Mr. Keck, and others of Counsel for Hale the Plaintiff. The Bill was opened, and the other Proceedings in Chancery; the Equity they pretended to arise to them, because that the Defendant having, as the Master reported, been over-paid above Bagnal's Stat. 4000 l. he immediately after that Statute satisfied, received the Profits in Wrong of the Plaintiff; and as some of the Counsel expressed it, became a Trustee, or in Nature of a Trustee, for the Plaintiff, which, had not the Plaintiff been hindred from extending at that Time, by the false Plea of the Defendant, by setting forth an Intail and Extent falsly, the Plaintiff by his Extent would have had.

In answer to which the Defendant insisted:

1st. That when the Creditor lent the Money, and chose his own Security by taking a Penal Bond for it, he made himself Judge what Recompence he should have in Case the Obligor performm'd not his Agreement; so as if a Man agree to do or not to do such or such a Thing, and take Security to do it or not to do it, This Court shall never enlarge his Security, and better it for him; and to that Purpose Curtis and Dawes Case was put, and Elliot and Hale's Case.

And in the Debate of this Case, the Lord Chancellor, by Way of Question, ask'd the Plaintiff's Counsel, If a Man for Money takes a Mortgage, and lets the Interest surmount the Value of the Mortgage, shall this Court mend it?

As to the Falshood of the Answer, the Answer was not a contriv'd known Falshood; for 1900 l. was satisfied not by Profits but Sale; and as to the Intail, it was not false but true, for the Land was intailed: But the Plaintiff Hale, at the Trial produced a Fine levied by Samuel Thomas our Brother, which Fine was not of a Third Part of the Houses intail'd, and consequently not of that Third Part till Election of the Conizee and Cestuy que Use; which never was done, as if Tenant in Tail of Three hundred

Houſes or Acres of Land, levy a Fine of One hundred; it is no Bar of all or of any Part till Election made, and till Election, the Lands remain intailed: Upon which Grounds we firſt inferred, that our Allegation that the Land was intailed and deſcended ſo, was not falſe, at leaſt it was a probable and diſputable Point, and not culpable to be alledged, to draw upon us a Penalty beyond the Penalty of a Bond, as was endeavoured.

2dly. The Report of the Maſter that chargeth us with the Profits of the whole Land, when Part was only bar'd, is a Wrong to us, which now we may alledge at the hearing of the Cauſe at large; for in Truth the Plaintiff was not appriſed of this before the Maſter.

Laſtly, The Plaintiff's Bill being to ſet aſide Incumbrances, to the End he may have Remedy at Law, and had a Decree that he might go to Law accordingly, and in 1684. purſued that Decree, and had an Order to take Execution on the Judgment, and after took out (in Purſuance of the Decree) a Scire facias to have Execution, as he did the 33d of Car. II. and Judgment thereupon to take out Execution without Damages; for in a Scire facias no Damages are ever given, and after that Judgment took out an Elegit, which forced us to bring in our Money, or lie under that unreaſonable Suit, where it ſtill remains; and it is too late now ſince he has made his Election to go from it, and it was a ſtrange Caſe where a Man has obtained a Decree to proceed at Law; and having proceeded at Law, hath got as much as the Law will give him, then to fly off from his firſt Decree and Proceeding at Law, to have a new and another Kind of Decree, and more than ever he asked in his Bill: By the firſt Decree and Judgment, and Proceedings, our Perſon is not charged, but by this new Proceeding he would charge our Perſon, and turn a real Charge upon our Lands into a perſonal Charge upon our Perſon.

In the Debate the Chancellor asked what Remedy we had at Law for our Money, which we had paid into the Common Pleas Court?

And after long Debate, the Court diſcharged the Order on the Petition, Novemb. 1686. The Lord Chancellor in the Debate inſiſted that the Plaintiff had made his own Election by taking Execution by Elegit.

Durſton *contra* Sands.

S. C. 1 Vern. 411. 2 Chan. R. 398.

Patron took Bond to reſign. Ante 19.

THE Defendant, Patron of the Church of Meſſenden in Gloceſterſhire, took a Bond from the Plaintiff to reſign upon Requeſt.

Perpetual Injunction.

Upon hearing the Cauſe, a perpetual Injunction was decreed againſt the Bond.

For the Court, and all Sides agreed, that the Bond was good; yet if the Patron made Uſe of it to his own Advantage, by detaining Tithes or the like, the Court would relieve againſt the Bond; and in this Caſe the Patron did detain his Tithes from the Plaintiff, whom he had preſented; he pretended in his Anſwer a Modus decimandi, but made no Proof of it, and being Patron of ſeveral other Churches, had taken Bond from thoſe he had preſented, and made ill Uſe of it.

Hale *contra* Thomas.

S. C. 1 Vern. 349. Ante 182.

THE Report of the Maſter, which chargeth Dagnall's Statute (which was precedent to the Plaintiff's Judgment) to be ſatisfied; and upon which Report the Plaintiff was let in, and now the Plaintiff being ſtaid ut ſupra, from further Execution: Yet now prayed a new Hearing of the Original Cauſe, inſiſting that by the Maſter's Report it did appear that the Defendant, after Dagnall's Statute ſatisfied, had received of the Profits 500 l. per Ann. and ſo on the whole Matter had received 4000 l. and as ſoon as he had Satisfaction of Dagnall's Statute, he became in the Nature of a Truſtee, and reſponſible to the Plaintiff for the Profits received.

But in Regard of his taking Execution by Elegit, the Lord Chancellor would not relieve the Plaintiff in that Point, but inclined againſt the Plaintiff on that Point alſo.

But if it had come into Debate, the Maſter's Report muſt have been re-examined, and would have failed.

1. Because there was a grand Mistake therein, for he computed 500 l. per Annum for two Years to amount to 1500 l. which cannot be. 2. But a greater was the Intail of the Houses is of 300 and more; and the Fine levied to bar the Intail was not of 300 but of 80 l. or thereabouts, which in Truth bar'd no Part till Election of the Conizee, &c. but clearly could be no Bar of more Houses than are comprehended in the Fine. But yet the Master hath charged the yearly Profit, being 500 l. on the whole Houses, in Satisfaction thereof. 3. Another Error in the Report is, that 1900 l. was raised by Sale of Part of the Inheritance, which is not wholly to be so charged; for the Inheritance is not to be sold to satisfy the Profits, but only the annual Profits.

Canning *contra* Hicks. 26 Decemb.

S. C. 1 Vern. 412.

Mortgagee, where the Mortgage was of the Fee-simple to him, deviseth 100 l. and other Legacies, and then adds a Devise of 100 l. to the Defendant, whom he makes Executor, and dieth.

Testament. Legacy.

Two Points were decreed:

1st. That the Executor shall have the Benefit of such a Mortgage, viz. the Land, and not the Heir, though the Land be descended to him.

2dly. That the Legacy doth not bar the Executor of the Mortgagee, tho' it was much press by Mr. Finch and others to the contrary, and that it was an Implication that the Executor should have no more than the 100 l. because the Testator expressly willed that the Executor should not be paid his Legacy till after his Debts, and other Legacies paid; so that the 100 l. is as much in this Case, as if he had expressly devised the 100 l. out of the Residue of his Estate after his Debts and Legacies paid, which doth strongly infer he meant no more than the 100 l. not the whole Residue.

S.C. 1 Vern. 405, 419, 423, 428, 437.

The Lord of Kildare *Plaintiff, Sir* Morrice Euſtace *and others, Defendants.*

A Truſt of Lands in Ireland directed and decreed here, &c. Vide poſt 214.

A Leaſe for Fifty Years was made by Sir Morrice Euſtace deceaſed, in Truſt for George Fitz-Garret: That George Fitz-Garret was attainted of Treaſon in Ireland, and an Office found, whereby the Truſt was forfeited to the King, and derives Title to the Truſt by Grant from the King, and prays that the Defendant, who is Executor to the Leſſee, may execute the Truſt, and aſſign the Leaſe. The Defendant by Anſwer confeſſeth the Leaſe and Truſt; but that George Fitz-Garret who was attainted, was not the Ceſtuy que Truſt, but another Perſon who in Truth was a Rebel in Ireland, and attainted of Treaſon; ſo as the King had no Title, and that if the King had any Title, yet the Bill in Equity did not lie; becauſe if all were true, yet by the Act of the Settlement, which gives all Lands of the Rebels in Ireland which they or any in Truſt for them, ſhould be to the King; thereby the Eſtate of the Lands is in the King, and not only a Truſt: And ſets forth further, that thoſe Matters had been queſtioned in ſeveral Suits, viz. whether that Sir Morrice Euſtace, the Leſſee, were the ſame Perſon who was attainted or no, or whether the Eſtate or a Truſt only veſted in the King? And that the now Plaintiff had had three Suits by Bill in Equity, and alſo a Bill in Chancery in Ireland, which he waved, (I think) diſmiſſed, and the Defendant had two Verdicts at the Bar in Ireland for his Title, viz. That Sir Morrice Euſtace the Leſſee was not the Perſon attainted, but another of that Name; and thereupon the ſaid Mr. E. coming into England to defend himſelf, the Plaintiff did diſmiſs his Bill in Equity in Ireland, and exhibited this Bill here.

1 Roll. Abr. 597.

The Cauſe being heard here, the Lord Chancellor doubted whether as this Caſe is circumſtanced, viz. after two Verdicts and Judgment in Matters triable in Ireland, viz. which of the two was the Perſon who was attainted, and the Point in Law upon the Act of Settlement, he could not determine it, and Precedents directed to be ſearch'd: And the Chief Juſtice of the Common Pleas, and Chief Baron of the Exchequer to be attended with them, which was done; And now the Cauſe, the ſaid Judges aſſiſting, came to a

hearing, and the Plaintiff's Councel Serjeant Holt, Mr. Finch and others, argued for the Plaintiff, making the Queſtion to be, whether a Truſt of Lands in Ireland, and the Truſtee being here in England, this Court hath Juriſdiction; for tho' this Court cannot execute their Decree by Sequeſtration, or giving Poſſeſſion of Lands in Ireland, yet they can compel the Party; and in the Caſe of Partition, the Court here decreed Account of the Profits, although they diſmiſſed the Bill as to the Partition of the Lands: And though here the Court will not grant Sequeſtration as in the Caſe of Partition, nor name Commiſſioners in Ireland to make the Partition; yet they can compel the Party to convey by Impriſonment, and otherwiſe there would be a Failer of Juſtice; for they in Ireland cannot relieve becauſe the Party is here, and we here becauſe the Land is not here, and ſo no Juſtice could be done; and the Bill diſmiſſed: Sed quære?

1 Vern. 424, 437. 1 Mod. 16.

For in 1 Vern. 439. it is ſaid, (That the Lord Chancellor was ſatisfied on Peruſal of the Act, that the Eſtate in Law veſted in the King, but that the Plaintiff might notwithſtanding be proper for a Decree; and held, That this Court might well direct a Trial, whether the Perſon that forfeited and the ceſtui que Truſt was one and the ſame, citing Sir William Tyrringham's Caſe, who being ſo powerful, that Right could not be had againſt him in Buckinghamſhire; the Venue was chang'd on a Bill brought here for that Purpoſe; and declared, that except the Defendant would conſent to try the Identity here, he would decree it without more. Whereupon a Trial was directed to be had by Conſent in Shropſhire; but at the Inſtance of Ch. Baron Turner, it was with this Direction, that if the Verdict went for the Plaintiff it ſhould be without Coſts, but if againſt him, he ſhould pay Coſts.

Venue changed on a Bill brought here.

And note in the Caſe of Barnwell and Rochford, Roll. Abr. 597. A Trial was directed touching a Feoffment of Lands in Ireland. Vide 1 Vern. 438.

DE

DE
Term. Sanct. Mich.
Anno Regis 3 Jac. II.
IN
CANCELLARIA.

S. C. 1 Vern. 208. Ante 143.

Commiſſion of Bankrupt. Vide ante 72, 135, 139, 153. Poſt 196. Superſedeas.

Alderman Backwell's *Caſe.* 8 Nov. 1687.

A Commiſſion of Bankrupt iſſued againſt Alderman Backwell, and the Creditors who ſued out the Commiſſion were compounded and agreed with; and thereupon a Superſedeas to the Commiſſion was granted. The Earl of Exeter, and a Hundred other Creditors, petitioned that the Commiſſion may be revived, and the Superſedeas quia improvide emanavit, ſet aſide.

And by Pemberton Serjeant, and others, inſiſted;

1ſt. That they were the greateſt Number of the Creditors who deſired it.

2dly. The Commiſſion is de jure granted, and could not at firſt have been denied.

3dly. And when it is once granted, then all the Creditors, every one of them, are intereſted in the Benefit and Proceeding of the Commiſſion equally with the Reſt of the Creditors, at whoſe Petition the Commiſſion was granted; ſo as they came in, and pray to be admitted within the four Months, and tender their Contribution.

4thly. And the Non-Petitioners now pray to be admitted, and though now the four Months be past, it is not their Fault, because the Superſedeas being granted within the four Months, they could not be blamed, for they had Time till after four Months.

5thly. And ſeeing they were intereſted in the Commiſſion as well as the Petitioners for the Commiſſion, the other Creditors cannot hinder them from coming now into it, without which they ſhould loſe their Debts.

The former Debates on this Matter did produce ſome Propoſitions of Accord, from Mr. Backwell, Son and Heir of the Alderman; which now not being acquieſced in, &c.

Lord Keeper. I hold that the Commiſſion is de jure, and the Statute which ſaith the Chancellor may grant, &c. is as if it had been, ſhall grant or ought to grant; but he cannot grant ex officio, but on Requeſt of Perſons intereſted. If twenty Men ſwear before me, that J. S. is a Bankrupt: Yet without Petition of a Creditor I may not award a Commiſſion; but when it is once granted, if the Perſons that petition were well ſatisfied, I do think a Superſedeas may be granted as well within the four Months as after, poſſibly they who petition find that it is beſt for them ſo to have it; for if their Debts be by Judgment, they will be preferred before others: Whereas on the Commiſſion they muſt come in but in Proportion with others, and it is quæſtio Juris. I will hear it aſſiſted by Judges.

No Commiſſion of Bankrupt granted without Petition of a Creditor.

Note; When once a Commiſſion is granted, it is Folly for the other Creditors to ſue for their Debts at Common Law or Chancery; for if they ſhould recover, yet it will not avail them, but they muſt be liable to the Commiſſion; ſo if they had Judgment not executed, it were vain to ſue Execution, and therefore Time is given to all Creditors, viz. four Months to come in; and if they might be hindred to come in before the four Months, it might be made a Trick to coſen them, viz. A. hath Judgment, B. ſueth out a Commiſſion, compounds, &c. and takes Satisfaction, gets a Superſedeas. A. could not have Execution.

Afterwards

Afterwards other Creditors petition'd the Lord Chancellor, Sir George Jefferies, Baron of Wem, to take off the Superſedeas, and to renew the Commiſſion.

Which was much oppoſed by Mr. Backwell, Heir to the Alderman, who had after the Superſedeas granted, and granted at the Suit of all the Creditors, who petitioned at firſt for the Commiſſion, compounded and agreed with the ſaid firſt Petitioners.

And now the 8th of November 1687. The Attorney General, Pemberton, Holt, Serjeants, Mr. Finch and others, argued very earneſtly againſt the Granting of the Commiſſion:

1ſt. Becauſe Alderman Backwell, againſt whom the Commiſſion was firſt granted, was dead, and was not in his Life declared a Bankrupt.

2dly. Becauſe by the Death of the King, the Commiſſion is determined, as all other Commiſſions are; and if the Stat. Jacobi had not provided otherwiſe, the Commiſſioners could not have proceeded after the Death of the Bankrupt, tho' they had acted or dealt in the Commiſſion before the Death of the Bankrupt; but the Statute provides for that Caſe, but doth not provide in Caſe of Abatement of the Commiſſion by the King's Death, with whom all Commiſſions died alſo; and they argued much that by the Words in the Statute, viz. (dealt in) is meant a Proceeding by the Commiſſioners (as Holt ſaid) till Diſtribution, (as others ſaid) till the Party were declared Bankrupt.

Lord Chancellor. I am no Friend to the Commiſſion of Bankrupt; it hath occaſion'd much Hurt, and inſtanced in a Caſe lately before him, wherein the Charge and Expences of the Commiſſioners, and their Attendance, came to 400l. and the Diſtribution to the Creditors 7s. in the Pound; each Commiſſioner claimed 20s. per Diem, 10s. Half a Day, &c. but as to this Caſe I do renew the Commiſſion for the Agreement of the Perſons who firſt petitioned; for the Commiſſion cannot prejudice any other Creditor that did or might come in and contribute, yea tho' there ſhould be but one ſuch Creditor for the Petition; for the Commiſſion is expreſly in Behalf of themſelves and all other Creditors; and the Commiſſion is ſo granted, and cannot be

otherwiſe, ſo as the Petitioners for the Commiſſion are no more concerned than others, or any others that ſhall come in; and the Statute that gives Continuance to the Commiſſion when the Bankrupt dieth, maketh it all one as if the Bankrupt died not; for tho' he be dead, yet as to this Purpoſe he is ſtill living.

(Lord Chancellor to Pemberton.) Suppoſe Backwell were living, and the King dead, Might not the Commiſſioners proceed, or grant a new Commiſſion?

Pemberton. Yea, a new Commiſſion.

(Chancellor.) Yes, and proceed where the other left, and their Proceedings as effectual as the former, or any Acting of Commiſſioners: If it be but receiving Money for Contribution, (as they did of ſome) of the new Petitioners, is a Dealing within the Words of the Statute. And in fine he granted the Commiſſion.

Note; The Superſedeas was granted within the Time the Statute gives to Creditors, who did not petition to contribute; and they being now by Act of Court diſabled, may not they after renew? Superſedeas.

CASES

Omitted in the Former PART of

Cases in Chancery.

DE

Termino Paſchæ,

Anno Regis 26 Car. II.

IN

CANCELLARIA.

Taylor *contra* Beverſham.

The Caſe.

Rebutter of Equity.

SHephard ſeized of a Copyhold held of the Manor of D. Taylor purchaſed the Copyhold, and after he alſo did purchaſe the Manor of D. and after treated with William Beverſham for the Purchaſe of the Manor. Taylor gave him a Particular of the Manor, wherein all the Parcels of the Manor were expreſſed with their ſeveral Values, but very much over-valued, as was proved. Taylor gave 4300l. for the Manor, and Beverſham

sham paid him 4000 l. for it, but the Copyhold Tenement (Value 24 l. per Annum) was not in the Particular. Beversham enjoyed the Parcels in the Particular six Years, but never in that Time claimed the Copyhold Tenement, but Taylor enjoyed it; but the Conveyance was of the Manor and the said Parcels, with this Clause (All which the said Taylor purchased of Sheppard) which Clause being affirmative restrained not the Conveyance, but notwithstanding the Copyhold passed as Part of the Manor, and Mr. Beversham recovered the same at Law, and now this Bill was to be relieved against the Conveyance for the Copyhold.

He who will have Equity must do it. Vide 2 Chan. R. 247, 360. 1 Vern. 282, 294, 245, 29, 40, 350, 141, 467. 1 Chan. C. 97, Ante 7, 23, 87, 164.

Mr. Attorney, Sir John Churchill, Mr. Cook, &c. The State in Law is in the Defendant, who used no Fraud to obtain the Conveyance, and by Accident without any Art of his, the State of the Copyhold in Law is in him, and conveyed to him by the Plaintiff, who abused the Defendant in the Particular greatly, over-valuing what he sold, and the Values set down, so as there is a Rebutter in Equity to his Demand, not out of a Collateral Business, but in this very Business; and we offer, that if the Plaintiff will make good his Particular, we will quit the Copyhold Tenement.

Relief against a Purchaser who paid not for it.

The Lord Keeper. I like not purchasing by a Particular, it commonly breeds Suits. I find Beversham abused in the Particular, but since he neither treated for the Tenement nor paid for it, and other small Parcels of 20 s. 10 s. &c. Value, &c. are in his Particular and Conveyance; this of 25 l. per Annum would not have been omitted if he had meant to purchase it, and the Plaintiff never intended to sell it, which the Clause also implies; therefore I decree it for the Plaintiff, but he shall pay the Rent arrear, and for the future hold it in all Respects, so as Copyhold Estate subject to Forfeiture and uncertain Fine, &c. as it was before the Regrant to him by Copy, &c.

Copyhold.

Note also; Where Words in a Conveyance pass more than was intended, Equity will relieve, as 2 Ventr. 345. Vide ante 86. &c.

William Strode *contra* Edward Strode *his Brother.*

Not in Issue, yet proved.
Vide ante 2, 3, 40, 41.

THE Bill was for Evidences of the Inheritance which the Plaintiff claimed by Descent. The Defendant set forth a Title to a Lease made by their Father to him for sixty Years, but now at the hearing shewed a Conveyance to him by the Plaintiff himself, which was proved in the Books as well as the Lease.

The Plaintiff's Counsel, my self and others allowed the Lease, but prayed the Writings touching the Inheritance; for the Proof of what is not in Issue is idle, the Proof must be of what is alledged, else the Plaintiff is prevented from cross examining or alledging to the contrary, as if he had a Reconveyance, Release or the like.

Lord Keeper. I shall not decree an Inheritance away against what I see; and dismiss'd the Bill.

Street *contra* the Mercers Company *and* Mosse.

Bankrupts.
Ante 12, 135, 139, 143, 153, 156, 190.

COats possessed of a Lease for Years contracted with the Committee of the Company for a new Lease, and paid Part of the Fine, and by Coats's Consent a new Lease was made to Mosse by the Company, and to him executed. Coats was at the Time of the Treaty a Bankrupt. The Question was, whether the Commissioners could assign the Lease to the Prejudice of Mosse; and Drake's Case was cited.

The Lord Keeper ordered that the Plea and Demurrer be ousted, and the Benefit thereof saved till the Hearing; he doubted of the Lease; there were other Matters for the Benefit of Mosse also in the Plea.

DE
Term. Sanct. Trin.
Anno Regis 26 Car. II.
IN
CANCELLARIA.

Breſſenden *contra* Decreets.

LAwrence Owner being indebted by Judgment, and ſeized of Lands thereto liable of the Value of 300 l. per Ann. died Inteſtate. Charles an Infant, being his Heir, Rebecca his Wife takes Adminiſtration and poſſeſſeth the Perſonal Eſtate, and enters as Guardian on the Lands, and received the Profits two Years, and made the Defendant Grace Decreets her Executrix, and charged it; ſhe alſo entred as Guardian, and poſſeſſed the Perſonal Eſtate of Lawrence and Rebecca; Charles died, the Plaintiff Breſſenden his Heir was compelled to pay 200 l. on the Judgment; the Defendant took out Adminiſtration of Charles his Eſtate.

Heir.
Executor.
Vide ante 1, 4.
1 Chan. C. 7, 177.
1 Vern. 431.
Curſ. Cancel. 437, 438.

The Scope of the Plaintiff's Bill was for Repayment of the Money; but the Defendant pleaded her Adminiſtration to Charles, and thereby to be diſcharged of any Account of the Eſtate of Charles, and demurred, becauſe no Adminiſtrator de bonis non was Party.

The Lord Keeper's Opinion was, that the Profits taken by the Guardians ſhould be liable to make Satisfaction to the Plaintiff, but the Perſonal Eſtate in Rebecca's Hand was liable in the firſt place in Caſe of the Heir, to which the Adminiſtrator de bonis non is liable; and in that Reſpect he held the Bill ill, and gave the Plaintiff Leave to amend the Bill in that Point.

Gibbons

Gibbons *contra* Dawley.

Teſtament. Diſcretion. Diſtribution. Fifteen accept, the ſixteenth, &c.

THE Teſtator gave ſeveral Legacies and deviſed that the Reſidue ſhould be divided amongſt ſeveral of his Kindred by Name, ſixteen in all, in ſeveral Proportions ſet down by him; but deviſed that the Quantity of the reſiduary Eſtate ſhould be as his Executor voluntarily and without being thereto compelled by Law ſhould declare. The Executor declared what the Sum of the Reſidue was, and accordingly paid fifteen of thoſe Legatees, but the Sixteenth exhibits a Bill to diſcover the Eſtate, ſuppoſing it more.

After much Debate the Lord Keeper diſallowed the Plea, ſaying, We muſt take heed that we make not ſuch Examples, under which, if Men will be diſhoneſt, they may ſhelter their diſhoneſt Dealings; and what if the Executor would make no Declaration, this Court will have an Account made.

Blake *contra* the *Eaſt-Indid* Company.

Penalty. Eaſt India Company. Trade. Ante 36, 76. Poſt 238.

THE Company employed Blake as their chief Agent in India, and by Indenture they took a Covenant of him, that he ſhould not trade for himſelf, nor any other in Salt-Peter, Pepper, and divers other Commodities; and Blake covenanted to pay ſeveral Rates for every Pound of Salt-Peter ſo traded in contrary to the Covenant 6d. and ſo of divers other Rates for ſeveral other Commodities, which Sums were ſome four, ſome five, and ſome ſeven Times the Value of the Commodities. Blake bought the Commodities for himſelf in India to his own Uſe; the Company brought Debt for 26000 l. to which Sum the Penalties amounted againſt Blake, who brought a Bill to be relieved againſt the Penalty; and notwithſtanding that he proved that it was for the Benefit of the Company that he ſo traded, for he bought none but what he ſold to them at a juſt and market Price, and that if he had not provided ſuch Goods, the Company could not have been ſupplied, and their Ships would have return'd ſhort, and what he bought was with his own Money, when he had no Effects of the Company; and altho' he had given Notice of the Want to the Company, and he dealt with poor Artificers, who

could not ſtay, but muſt have Advance before-hand, or elſe they would not work at all, but moſt probably would have been dealt with by the Dutch to the Loſs of the Company; and it was proved by the Defendant's own Witneſſes that ſuch Dealings were neceſſary for the Supply and Benefit of the Company; and that the former Agents for the Company, and the Agents for the Dutch uſed ſo to do.

Yet my Lord Keeper diſmiſs'd the Bill, tho' it was objected that this Covenant was a greater Penalty than a Bond of double the Value; ſo it was but an artificial Dividing of a Penalty of a Bond. Max. 52. Vide poſt 219.

Lord Keeper. A Leaſe is made rendring Rent, and if a Meadow be plowed to pay 5 l. Rent per Acre, is this relievable? I ſee not how the Company can ſubſiſt unleſs ſuch Trade be reſtrained. Diſmiſs the Bill.

Tyas *contra* Talbot *and others*.

THE Plaintiff was Guardian in Socage to the Infant the other Defendant, who had ſuſtained divers Suits for the Infant, and paid Debts to which he was liable, and aſſigned the Guardianſhip to Talbot, and decreed an Account; his Diſburſements and Payment of Debts to be allowed, and what due to be paid out of the Infant's Eſtate in Talbot's Hands by Talbot. The Maſter certifies 140 l. due, which was decreed, and Talbot in Contempt for Non-payment appeared, was examined, and ſet forth on Examination, that the other Defendant, the Infant, died two Days before the Decree was inrolled, and the Cauſe ſet down to be heard: But the Contempt affirmed; for the Death of the Infant he had not proved; but there could be no Examination thereto; but the main Reaſon was becauſe the Lord Keeper took it that the Decree had fixed the Payment on the Defendant Talbot, ſhe having confeſſed Aſſets of the Infant's Eſtate in her Hands by her Anſwer, and therefore what ere became of the Infant or his Eſtate, ſhe is liable.

Guardian. Contempt. Poſt 211, 245. Ante 137, 8.

Inrollment poſt mortem. Poſt 227, 247. Ante 161.

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DE
Term. Sanct. Mich.
Anno Regis 26 Car. II.
IN
CANCELLARIA.

Parker *contra* Dee.

Executor.
Assets.
See 1 Chan. C. 257, &c. ibid.
Ante 9.
2 Chan. R. 37.

CHarles Everard a Banker owed the Plaintiff 700 l. and was also indebted to divers other Persons by Book-debts, &c. without Seal, and by several Judgments to others, and to B. by Recognizance in Chancery to perform the Order of the Court, and that being for Money, there was a Judgment thereon, so the Recognizance and Judgment was for the same Debt in Effect, the Defendant being Executor of Everard. Trin. the Plaintiff sued the Defendant in Communi Banco for his Debt. The Defendant pleaded all the Judgments which were on penal Bonds, and pleaded also the said Recognizance, ultra quod, &c. he had no Assets; the Plaintiff sued here April 1668. to discover the Truth of the Plea, and Debts therein set forth and the Assets.

Thereupon the Defendant obtained an Order that the Plaintiff should make Election whether he would proceed in this Court or at Law. The Plaintiff elected to proceed here. The Defendant used very many Delays by Petition and Contempts to put off the Hearing in this Court, and paid divers of the Debts which were of the same Nature with the Plaintiff's Debts without Specialty, pending the Suit in this Court. The Cause being heard it was decreed to go to an Account, wherein the Executor

Lis pendens.

was to be allow'd all just Debts due by Record or Specialty, and all Debts without Specialty, which were paid before the Plaintiff's Bill to be allowed; but not such as were paid voluntarily, pending the Suit, or whereon voluntary confessed Judgments were for Debts without Specialty.

The Defendant got the Master of the Rolls, who heard the Cause, to re-hear it, and used other Delays, and at last appealed to the late Lord Chancellor, who made a Decree therein; and not content therewith, appealed to the new Lord Keeper. A Case had been stated, and the Cause being new heard by the Lord Keeper, the Defendant prest for Dismission, because the Plaintiff had the Effect of his Suit to make a Discovery, and it was his Ignorance to choose to be dismissed before such Time as he had examined his Witnesses.

Lord Keeper, &c. There have been six Hearings in this Cause, three on Interlocutory Orders, and three on the Merits; as for Dismission to Law, because the Plaintiff hath Discovery here, when this Court can determine the Matter, that shall not be an Hand-maid to other Courts, nor beget a Suit to be ended elsewhere; the Defendant hath used great Shifting and shew'd great Partiality; his Plea at Law was false and deceitful, for it appears he compounded Debts at smaller Value, and pleaded the whole Debt as due; he compounded a Debt of 300 l. for a Jewel 200 l. Value, and in Truth but worth 100 l. and paid Debts of the same Nature as the Plaintiff's, pending this Suit, without Compulsion by Suit, which he ought not to have done; for after the Suit begun the Executor may not excuse himself by any voluntary Payments; he may use legal Delays, as Imparlance and Essoins, &c. to prefer one Creditor before another, but he may not do it by false Pleading of what lieth in his own Knowledge; otherwise, if the Falsity lie not in his Knowledge, as Non est factum Testatoris, in this Case the Plea was false and fraudulent, and therefore the Plaintiff here shall have the same Advantage as if the same Plea were found false by Verdict at Law, and shall have all the same Consequents here as follow on a false Plea at Law to all Intents. And all Judgments voluntarily confest after his false Plea go for nothing, and decreed accordingly. Account of Assets with their Directions; but Copyhold are no Assets, and the Lands devised or conveyed to pay Debts must be in Proportion equally of Debts by Bond or otherwise.

1 Cha. C. 311.
Post 225.
M. 36.

Lis pendens.
Vide ante 83, 115, 116.
Post 223.

Rothwel *contra Sir* Charles Hussey, *Dame* Hussey, *&c.* 20 Novemb. 1674.

Lease Parol. Trust in four, three lease.
Ante 49, 152.
Post 207, &c.

SIR Charles Hussey, Father of the Defendant Charles, &c. seized in Fee, made his Will, and devised the Lands in Question to Sir Richard Markham, B. B. W. B. and White for one and thirty Years, in Trust to pay his Debts and Portions to his Daughters, and after for his Heir, and died: The Will is proved in common Form, and Sir Richard Markham and two others of the Trustees without White, the fourth Trustee, by Writing under their Hands authorize Rose, who was Sir Charles Hussey's Bailiff at the Time of his Death, to continue and to receive the Rents, manage and let the Lands, who by Parol let them to one Bonnor for eleven Years; Bonnor assigned to the Plaintiff, who entred and enclosed, &c. There is an Action at Law brought by the Heir, and an Ejectment sealed, and Judgment in both Actions. The Plaintiff's Bill was to establish his Possession, and to be relieved against the Actions; the Equity was because the Lady Hussey detained and concealed the Will, so as the Plaintiff could not make his Defence at Law by the Will, being of Lands, so as the Probate was not Evidence; and in Truth the Lady had the Will, and confessed she had a Paper subscribed by Sir Charles Hussey, but knew not that it was her Husband's Will, and she did now produce it in Court at Hearing; yet because the Plaintiff's Title was but a Lease Parol, the Lord Keeper declared, he would never give Relief. And secondly, for that the Lease was a Breach of Trust being by Authority of three only, and he would not give Relief to a Lease made in Breach of Trust, therefore he dismissed the Bill, though it was objected, that the Verdicts were on the Heir's Title, which was contrary to the Trust.

Woodward *contra* King.

Service of an Injunction.
Ante 15, 93, 165.
1 Chan. C. 75, 80.

WOodward had an Injunction for keeping, &c. Poſſeſſion, which in Truth was iſſued under Seal, but no Order or Affidavit to warrant it, but Order and Affidavit were after, viz. in December, though Injunction was in November. One Urry delivered Mr. King a Copy of the Injunction, and as he ſwore, ſhewed him the Writ under Seal. King deſired Urry to ſhew him the Writ to examine the Writ and Copy, to ſee how far he was concerned in it, which Urry denied, and King thereupon delivered back the Copy, but diſturbed Woodward's Poſſeſſion. King being proſecuted for the Contempt, it appear'd ſufficiently, that there was a Diſturbance and Contempt; if the Writ was well ſerved, it was acknowledged to be a good Service prima facie; but when Sight of the Original was deſired it ought to be ſhewn, as in Mackalley's Caſe. Coke's Reports.

A Bailiff or Sheriff makes an Arreſt, he need not ſhew the Capias; but if the Party requires to ſee it, he muſt ſhew it, or the Party is not bound to obey it; and if the Officer will not ſhew the Writ, the Party may reſiſt the Bailiff, and is not in Contempt for his Reſiſtance; but tho' it be in Caſe of Murder enſuing, is excuſable; and much more is the Defendant excuſable where a private Perſon, who is no Officer, ſerves a Proceſs on him, if he refuſeth to ſhew it, when he is requeſted to ſhew his Warrant, viz. the Writ, elſe it is he who ſerves the Writ is diſobey'd rather than the Writ, and otherwiſe the Inconvenience may be great; for if an Injunction be not granted, but one ſhews another Writ and delivers the Paper, and tells the Perſon that it is a true Copy of an Injunction to deliver Poſſeſſion, or to deliver up a Bond or other Writings, whereas there is no ſuch Injunction; if he will not ſhew it, however I muſt believe, and either fall into Contempt or loſe my Poſſeſſion, or deliver up my Writings to I know not whom; and what Remedy then? For tho' in eventu rei, if I diſobey I ſhall be free, becauſe there is no Ground of the Writ, yet I am in Danger and in Doubt till I can examine it; and ſuppoſe it be true, that ſuch Injunction was, yet poſſibly I knew not of it, and then it were very hard that the bare Affirmation of a Stranger, who ſerved the Writ, which may be is unknown to

Lord Keeper.
The Party below ſhall obey.
If he will diſpute he ſhall do it here.

me, (and they are commonly mean Persons who serve Process) shall put me on a Dilemma, either of Contempt, or Loss of Possession, or the like.

But the Lord Keeper declared the Service sufficient to ground the Contempt; for if he should deliver it to one Party, if he keep it, how shall the Rest be served with it?

His Lordship was going to the Council, else it might have been replied, that it is one Thing to shew it to be examined, and another to deliver it; he was not desired to deliver, but to shew it to be examined. 2d. Such Mischief may be prevented, if Fear be of such Miscarriage, by taking a Duplicate.

The Lord Keeper declared, that notwithstanding the Irregularity of Issuing the Injunction, it ought to be obeyed; and tho' the Disturbance which was, was by a Justice of Peace on View of Detainer of Possession with Force, and there was a Detainer with Force, yet that should not excuse it, for then the Process of this Court should be subject to a Justice of the Peace.

Duckenfield *contra* Whichcott.

Rent not abated by Loss or Eviction of Profits, &c. if no Covenant.
Vide 1 Chan. C. 85.
That an Agreement is binding, tho' founded on a Mistake.
Vide ib. 42.
Ante 136, 143, 164.

SIR Jeremy Whichcott, Warden of the Fleet, granted the same with some Exceptions, to the Plaintiff for 1000 l. in Hand, 1000 l. per Annum, and 200 Ounces of Plate-Rent: His Agent Gibbon gave a Particular of the Chamber-Rents to the Plaintiff, to induce the Plaintiff to the Bargain: Afterwards on Complaint of the Prisoners, the Judges of the Common Pleas reduced the Rents of the Chambers which the Prisoners were to pay, so as they came to near a Quarter less in Value. The Plaintiff thereon sought to be reliev'd, for this Order is compulsory, and in Nature of an Eviction; for tho' the Thing remain, the Profits which answer the Rent are taken away: But in Regard there was no Covenant in the Assignment for the Upholding the Values, or that they were such:

The Lord Keeper conceived it as other Cases of Purchase, where it seldom happens, but Things are over-valued. He dismissed the Bill.

Other Matters were debated, but Whichcott offered in his Answer to pay back all on mutual Account, &c. if the Plaintiff would wave his Bargain. The Plaintiff was put to his Election to take the Offer, or be dismissed.

Lingon *contra* Foley:

Lands sold where Legacy is out of Profits. Ante 115, 116.

DEcreed that a Deviſe of Lands to Truſtees on Truſt out of the Rents and Profits, to pay Debts and Legacies; the Truſtees may ſell the Land it ſelf: This Point roſe on Sir Henry Lingon's Will againſt Foley, who purchaſed and had Notice of the Will.

Incumbrances.

2. Henry, Son of Sir Henry Lingon, deviſed Lands to be ſold for Payment of Debts, the whole Eſtate being incumbred: The Truſtees ſold Stoke, Part of the Lands, for 6000 l. and the Truſtees aſſigned to him ſeveral of the Incumbrances bought off with his Money, and allowed good, tho' the Eſtate not wholly freed thereby.

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Term. Sanct. Trin.

Anno Regis 27 Car. II.

IN

CANCELLARIA.

Lutton *contra* Rodd. 21 June 1675.

Money tendred and refuſed loſeth Intereſt.

A Deed in Nature of a Mortgage, and Covenant to re-convey on Payment: The Money was tendred at the Day and Place, and refuſed: Decreed the Money without Intereſt from the Time of the Tender, and to re-convey, though that the Plaintiff ought to make Oath that the Money was kept, and no Profit made of it.

Where and in what Caſes Intereſt ſhall be paid, or not, ſee before 150, 153. Poſt 235. 1 Chan. C. 211, 258. 1 Vern. 168. 1 Chan. R. 116. 3 Chan. R.

DE
Term. Sanct. Mich.
Anno Regis 27 Car. II.
IN
CANCELLARIA.

Miller *contra* Stephens. 1675.

SIR Lewis Pollard made a Leaſe for Years to Sir John Northcot and others, for Payment of his Debts, and died: The Reverſion deſcended to Sir Hugh Pollard: The Truſtees, and Sir Hugh, aſſign the Term to Stephens by Way of Truſt to pay Stephens 750 l. Sir Hugh Pollard confeſſeth Judgment to Miller; Stephens receives the Profits, and pays them to Sir Hugh, to the Value of 800 l. Stephens having no Notice of the Judgment, nor was there any Extent on the Judgment.

Leaſe in Truſt to pay Debts.
Vide ante 49, 152, &c. ibid. 202, &c.

Decreed by the Lord Keeper, That he account, and the 800 l. not to be allowed otherwiſe than as to go in Satisfaction of his Debt, viz. Stephens's Debt.

Satisfaction.

Anonymus. 5 Novemb. 1675.

LEſſee for Years ſubject to a Truſt deviſeth Reſid' bonor', the Eſtate would but pay the Debts if all ſold; he payeth the Debts, and reneweth the Leaſe for a further Term, it being a Church-leaſe, and offer'd to account if any Profits would ariſe out of the old Term.

Leaſe in Truſt renewed.
Vide ante 63, 73, 78, 129, &c.
Executor.

But

But Sir John King prest that he could not be charged further; for if he pay the Debts to the Value, then the Property is altered, and vested in him, in his own Right.

Lord Keeper. The Executor shall make no Advantage to himself, and shall account for the new Lease as well as for the old: Did the Executor acquaint the Church with his Case, and did he declare that he would renew, and take it for the Time of the old Term, to the Benefit of the Creditors and Executorship, and the Rest for himself? By the French Law no Churchman can make a Lease to any but the old Tenant, unless it first be refused by the old Tenant.

Lord Keeper decreed accordingly.

Anonymus. *The same Day.*

Purchaser protected. See 1 Chan. C. 150 & 166, &c. ibid.

PUrchaser of Land incumbred with two Statutes purchaseth in a precedent Statute, having no Notice of the second Statute.

Lord Keeper. If he had no Notice of the second Statute before he was dipp'd in the Purchase, he shall defend himself by the first Statute, whether the same were paid off or no, if he can at Law do it, Equity shall not hurt him.

Jefferson *and* Dawson, *on* Plea, &c.

Ista respons. capta, where it was a Plea.

AN Answer and Plea taken by Commission was returned Ista respons. capta fuit per Sacrament', &c. So the Plea was not on Oath, and therefore rejected, but without Costs, because the Lord Keeper apprehended it as the Fault or Neglect of the Commissioners who took it, rather than of the Defendant.

Witness demur.

A Witness demurred to an Interrogatory, because she claimed Interest in the Land, and disallowed because she did not swear to the Interest, nor what Interest she claimed.

Duke *contra* Duke. 1675.

THE Bill ſuppoſed a Settlement on the Plaintiff in Remainder after the Death of Elizabeth his former Wife, and on certain Conditions depending on that Eſtate of Elizabeth, and was to examine Witneſſes to thoſe Points: The Defendant ſets forth a Settlement ſubſequent to the Time, pretended for the firſt Settlement on a ſecond Marriage, and Iſſue of that Marriage had fifteen Years ſince; and the Plea allowed; for it was alledged at Bar, that in Truth this Bill was but an Artifice to examine the ſecond Marriage, whether it were not in the Life of Elizabeth the firſt Wife, and ſo to Baſtardize the ſecond Children.

Settlement. Ante 17. Poſt 215, 250.

Examination. Poſt 251.

Lord Keeper allowed the Plea.

Warman *contra* Seaman, &c.

NAthaniel Burton ſettled the Lands in Queſtion for 100 Years, to William Warman and Julian Ux. for 100 Years. Julian ſurvived, and granted the Term to Penroſe and Thomas Warman, on Truſt, in theſe Words: That the ſaid Penroſe and Thomas Warman, their Executors, &c. ſhould ſuffer Julian to receive the Profits thereof during her Life, and for ſo much of the ſaid Term as ſhould be unexpired at the Time of her Death upon like Truſt and Confidence that They, their Executors and Aſſigns, or the Survivor of them, will and ſhall, upon any reaſonable Requeſt, aſſign All, and all their Intereſt and Right in the Premiſſes, to the Iſſue of the Body of the ſaid Julian; and for want of ſuch Iſſue upon like Requeſt, They, their Executors, Adminiſtrators and Aſſigns, ſhall aſſign all their Intereſt then to come to George Warman and William Warman, Brothers of the ſaid Julian.

Tail. Truſt. Vide Poſt 236. Ante 30, 63, 64, 78.

Julian had Iſſue Eleanor, and died: Eleanor died without Iſſue; the Plaintiff's Title was under the Brothers, the Defendant's under the Adminiſtrator of Eleanor.

At the firſt Hearing the Lord Keeper decreed for the Plaintiff, but on a ſecond Hearing obtained by Petition he referred the Matter in Law to Juſtice Rainsford, who certified his Opinion for the Defendant, having heard Counſel on both Sides.

And now, viz. the 16th of Decemb. 1675. gave his Judgment accordingly, and dismiss'd the Bill.

Lord Keeper. At the former Hearing, I look'd on Seaman as one who had, by Occasion of being Solicitor in a former Cause, thrust himself into the Title, which made me hold him to all Strictnes; but on the second Hearing, I find him a real Purchaser, and at first though Possession had gone against him all along, which appears otherwise; so those two Circumstances laid out of the Cause, it resteth on the Matter in Law, in which also my Opinion was against the Defendant, for these Reasons:

1st. That the Limitation of the Issue of Julian is to be taken as to a Purchaser, and consequently carrieth but an Estate for Life to the Issue, and the Conveyance or Assignment to be made to the Issue, though for the Term to be interpreted for the Life of the Issue, as in Wild's Case, 6 Co. and otherwise all the Issues must have taken jointly, and not successively: But referring it, the Judge hath certified his Opinion to the contrary, and not only that it was his Opinion, but as he informed me, that it was the Opinion of all the Judges with whom he had conferred, and gave Reasons for it, which I will be made Part of the Order, and am content to err in such Company.

Reas. 1. The whole Term was to be assigned to Julian, and then there can be nothing left for the Brothers; but this Reason is Petitio principii.

Issue. Exposition.

And I am not so much moved therewith as was said by the Defendant's Counsel, viz. It was a contingent Limitation, if I have Issue, the whole Term to my Issue; if no Issue, to my Brothers.

Reas. 2. That the Remainder to the Brothers after a Limitation to the Issue of Julian, is a void Limitation; for if it be taken as a Remainder to the Brothers, then they may not take it till all the Issue of Julian, and their Issues also be spent: Issue includes all, and is Nomen collectivum, and an Estate for Life of a Term devised to A. and after to the Issue of A. and for want of Issue of A. to B. It was adjudged a good Remainder to B. in the King's Bench lately, but reversed in Camera Scaccarii, on Error brought, and a Difference taken between such Limitation to Children and to the Issue; and cited Pears and Reeves's Case in Point.

Strickland *vid. contra* Coker.

Guardian of an Infant bound in his own Estate by Covenant of the Infant: The Guardian being Party to the Indenture.

COker was seised for Lives of the Prebend of Alton, being a Church-Lease, in Trust for Robert Strickland, an Infant, on a Treaty of Marriage to be had between the Infant and the Plaintiff, and 1000 l. Portion to the Infant's Use.

An Indenture was made with the Content of Coker Guardian, or pretended Guardian; whereby the Infant covenants that the Lease should be surrender'd, and a new Lease taken, and the Wife's Life therein for her Jointure: But though Coker seal'd the Indenture, yet there was no Covenant or Agreement on his Part, but was made Party only to shew his Consent. The Marriage was had, the Portion paid, the Husband died, the Lease surrender'd, and the Wife's Life put in.

Infant.
Ante 137, 138, 199.
Post 245.
Agreement.

The Widow sued Coker to assign for her Life, and decreed accordingly; and Coker pretending the Trust was in the first place to pay Debts to him, it was decreed the Debts should be paid out of the Trust after the Widow's Death.

The Decree was affirmed on a Re-hearing.

THomas Lord Richardson seised in Fee 1665. and Countess of Norfolk to the Defendants, Sir Robert Atkins, Knight of the Bath, and Henry Lord Richardson, Plaintiffs; Henry Lord Richardson, Reply and others, Defendants.

DE
Term. Sanct. Hill.
Anno Regis 27 & 28 Car. II.
IN
CANCELLARIA.

Taylor *contra* Dabar. 1675.

S. C. 1 Chan. C. 274.
1 Chan. Rep. 159.
Covenant to make further Assurance.
The Land evicted.
Covenantee purchaseth it.
See 1 Chan. C. 252, 259, 287.

A Purchaser of the Crown-Lands in the Time of the late War, sells Part to the Plaintiff, and covenants to make further Assurances: He on the King's Restitution for 300l. had a Lease for Years made to him under the King's Title.

Decree was he should assign his Term in the Part he sold.

Sir Hugh Windham *and Sir* Robert Atkins, *Plaintiffs*; Henry *Lord* Richardson, Bayly *and others*, *Defendants*.

The Case was,

A. mortgageth to *B.* and *W.* to *B.* and after *A.* seised in Fee of the Manor of *Ashwood* acknowledges a Statute to *B.* and after mortgages the same Manor to *C.* and after mortgages Part of the said Manor and other Lands to *D.*

THomas Lord Richardson seised in Fee 1663. acknowledged a Statute of 1000l. to J. S. and the 20th of June 1665. mortgaged the Manor of Ashwood in the County of Norfolk to the Plaintiffs, for 2000l. and the Twenty-second of June 1665. two Days after mortgaged Part of the same, and other Lands, (as was at first apprehended) to the Defendant B. The Mortgagor dies: Henry is Heir. Bayly the second Mortgagee agrees with

D. the second Mortgagee purchaseth in *B.*'s Statute. The first Mortgagee shall not be admitted to set aside the Extent on Payment of what is due on the Statute, without Payment of what is due on the second Mortgage also.

Marſhal another Defendant, Executor of the Countess, to put the Statute in Execution at his Costs, and to pay Marſhal the Debt due on the Statute, after such Time as the Statute should be extended, and an Assignment made thereof by Marſhal to Bayly; the Statute is extended in August 1672.

The Plaintiff's Bill is, that paying the Debt on the Statute, it may be set aside and assigned to them, and a Decree against Richardson to pay, &c. or to be foreclosed of Redemption. Baily in his Answer acknowledges the Money on the Statute, viz. 1200l. not yet paid, but offers to pay it on assigning of the Extent.

The Question is, whether the Plaintiffs shall be admitted to set aside the Extent on Payment of the 1200 l. without Payment of the 2000l. due on the second Mortgage, till the Statute is satisfied, according to the extended Value, and not according to the Justice of the Debt in Equity?

Object. 1. The second Mortgagees are in such Case protected against a former Mortgage only on this Reason, Because they are intitled to Equity by laying out their Money truly on their Mortgage, and are intitled in Law by purchasing in the former Incumbrance; so that having Title in Law and Equity, he that hath only a Title in Equity shall not prevail against Law and Equity: But Baily hath no Title in Law; for though the Statute be extended, yet it is not assigned to him, and he hath not yet paid the 1200l. and the Plaintiffs are ready to discharge him of that: And so offer. Ante 93. Post 217, 225.

Object. 2. The Defendant hath in his Mortgage made after the Plaintiff's Mortgage, not all the Lands mortgaged before to the Plaintiffs, but only Part thereof, and the Statute covereth the whole: Now if the Defendant may by the Purchase of the Statute thereby defend himself as to what is in his Mortgage, yet he may not defend himself against the Plaintiffs, as to such Lands as are not in his Mortgage: As if A. acknowledge a Statute to B. A. being seised of the Manors of E. and C. and after A. mortgageth E. to one, and C. to another; if E. purchase in the Statute, he shall secure himself against all Men so far as his own Debt is, and also as to one Mortgage, but not to both. Ante 20, 35. 1 Chan. C. 149, 150, 162.

The Lord Chancellor was strongly of Opinion against the Plaintiffs in both Points, but some Question of Fact arising

arising, viz. Whether any of the Lands mortgaged to the Plaintiffs were in the second Mortgage or no? The Cause was put off on Propositions.

Witness.
Vide ante 79, 80, 81, 84, 208.
Post 217.

Note; If a Man be named Defendant, who is proper to be a Witness in the Cause, the Plaintiff must by order strike out his Name before Answer, but after Answer he may by order examine him as a Witness, though his Name be not struck out of the Bill, if he be otherwise competent, as if he disclaims, or have no Interest, or only as a Trustee.

Cartwright *contra* Pettus. 1675.

Ireland.
No Partition here for Lands there.
Vide ante 188, 189.

Cartwright exhibits a Bill against Pettus: They were Jointenants of Lands in Ireland; the Plaintiff prays an Account of the Profits, and a Partition of the Lands.

12 Feb. 1675. The Lord Chancellor declared, that as to the Profits the Bill was good, the Person being in England, for they are in the Personalty; but as to the Partition, which was in the Realty, he could not here proceed, for he could not award a Commission into Ireland: And the Bill for a Partition was in the Nature of a Writ of Partition at the Common Law, which lieth not in England for Lands in Ireland.

See before 289. and the Notes there.

DE
Termino Paſchæ,
Anno Regis 28 Car. II.
IN
CANCELLARIA.

Charles Price *Plaintiff*, *and* Elizabeth Morgan *and* Herbert Evans, *Defendants*.

Marriage Settlement.
Ante 17, 209.
Poſt 250, &c.

GIles Morgan, on the Marriage of Cicely his Daughter to Thomas Price, Father of the Plaintiff, agreed to pay to William Price, Father of Thomas, 1000 Marks for her Portion, and William Price, the Grandfather of the Plaintiff was to ſettle Lands on Thomas and Cicely. The Settlement was made, and all the Portion paid but 1181. 3s. 2d. which Giles Morgan did keep in his Hands, becauſe the Jointure-Land of Cicely was incumbred. William Price, to whom the 1181. was due, made his Will, and thereby declared that 1181. ſhould be paid to Henry his younger Son in Truſt to take off the Incumbrances on the Lands, and made Henry and Anne his Executors, and died Anno 1634.

Mich.

Mich. 1637. Thomas finding the Land not diſcharged, exhibited his Bill againſt Giles Morgan his Father-in-law, who owed the 118l. and Henry who was to receive it; and therewith to clear the Eſtate, that the 118l. might be paid, and the Land diſcharged: To his Bill Giles in his Anſwer did confeſs the 118l. to be unpaid, and that he was ready to pay it; on clearing the Incumbrances the Cauſe went on to Publication, but before Hearing Giles died, and made W. Morgan his Executor: But yet Thomas brought on the Cauſe to Hearing, againſt Henry and William Morgan, Executor of Giles preſent in Court, (as the Order at Hearing recites) that William Morgan conſented to pay the 118l.

Whereupon it was decreed the 12th of October, 15 Car. That Sir Edward Salter take the Account what was unpaid of the Portion, and a Courſe directed for taking of the Incumbrance; and if William Morgan will keep the Money in his Hands any longer, he is to pay Intereſt.

A Report was made, and a Decree drawn up.

Thomas Price dieth, and Henry Price dieth; Charles Price paid the Incumbrance out of his own Eſtate, and takes Adminiſtration of Henry Price's Eſtate and of William's. William Morgan, Executor of Giles, deviſeth by his Will ſeveral Lands to his Executrix Elizabeth, and to Herbert Evans Defendants, to be ſold to pay his Debts: The Plaintiff prays Satisfaction out of the Perſonal Eſtate of Giles and William Morgan, and out of the Lands.

Debts. Truſts.

1ſt. Much Debate aroſe, Whether the Bill was a Bill of Revivor, or an Original; for after ſo long Time the Lord Chancellor on hearing the Cauſe, it being then repreſented as a Revivor, ordered a Diſmiſſion: But on ſecond hearing it appeared to be an Original Bill, and the Decree ſet forth but as Evidence.

Waſte. Devaſtavit by an Executor.

2dly. But diſmiſs'd Herbert Evans, who was no Executor, but Deviſee of Lands to ſell to pay Debts; for his Lordſhip declar'd that ſuch Proviſion to pay Debts, did not extend to Debts of the firſt Teſtator Giles, nor to make Satisfaction out of the Lands, if William Morgan, Executor of Giles, had waſted the Eſtate Perſonal of Giles to the Value of the Debt, and ſo it became the Debt of William in Equity, and he while he liv'd liable in Equity to make Satisfaction to the Value of ſo much as he had waſted, and in Conſequence

the Lands devised to be sold for Payment of Debts ought to be liable.

Lord Chancellor. Although by the Common Law, when the Executor wastes, his Executor shall not be liable, because it is a Personal Wrong; it is otherwise here, and the Common Law will come to it at last; and therefore whatever Estate of Gyles is come to Elizabeth, or to the Hands of William, which William her Testator wasted, the Personal Estate of William in the Hands of his Executrix shall answer. Waste. Ante 32. 1 Chan. R. 14, 106, 116, 242. 2 Chan. R. 94. 1 Salk. 161. 1 Vern. 23. M. 30.

But the Charge or Duty which fell upon William by wasting the Estate of Gyles is not such a Debt as is within his Will, when he willeth his Lands to be sold for Payment of his Debts; for it is not properly a Debt by Contract, but a Debt or Duty arising ex maleficio, which I hold not within the Meaning of his Will. Therefore dismiss the Bill as to Herbert, and let the other Defendant Executrix account according to these Directions. Moseley and Maynard's Case was cited at the Bar.

Anonymus.

IF a Suit be in Chancery for a Debt for Rent by Lease Parol or Simple Contract, and beginneth within Time of Limitation, and be dismissed after the Time of Limitation, the Court will not order the Defendant to take no Advantage of the Statute of Limitation, see Boscowen and Boscowen's Case. But if in such Suit the Party be stayed by Act of the Court, as by Injunction, &c. it is otherwise; for the Act of the Court shall do no Prejudice, as in Case of Demurrers at Common Law. Limitation. Stat. 21 Jac. Act of Court. Ante 93, 213.

Inglet *and* Inglet.

WItnesses examined to the Damage on Breach of Covenant not re-examined on the same Interrogatory, although speaking in the first uncertainly. Re-examination. Vide ante 80, 84, 214.

The East-India *Company contra* Mainston, *to have an Account of his Imployment, and charged him with divers Deceipts and Omissions in his Books of Accounts, which he had sent and delivered: To which the Plaintiff pleaded. The Case on the Plea was,* viz.

Factor of East-India Company to re-account.
Vide ante 6, 11, 57, 198.
Post 241.
M. 52.
1 Chan. C. 25, 30, 76.

THE Company had one chief Factory at Bantam, and other inferior Factories, as at Jambee and other Places in which the Factory, viz. their Agent and Council there had Power to place other Factors and Chiefs, and to inspect their Accounts, place and displace them. Bantam Factory and Council placed the Defendant chief Factor at Jambee, who acts in that Service six Years, and then gave his Account to the Factory at Jambee, which was there allowed, and then was again re-examined by the Chief and Council at Bantam, and sent to the Company here: And here the Company drew many Exceptions to the Defendant's Accounts in Writing, and sent them to the Factory at Bantam to inspect and examine, which they did; and on full Perusal and Examination thereof they allow'd the Accounts and disallow'd the Exceptions, and made a Ballance of Money due to the Defendant, and charged the Company here with Bills of Exchange to pay it. The Defendant returned into England; the Company paid Part of the Bills of Exchange, and delivered to the Defendant divers Goods of the Defendants, as Pepper, &c. but now sue for an Account, suggesting the same Errors and Deceipts formerly taken and examined, and disallowed: To which the Defendant pleaded the Matter aforesaid, and that rested quiet till he pressed for the Residue of his Money due on the Account and Bill of Exchange, and farther that divers of his Vouchers were forcibly taken from him by the King of Jambee, a Heathen; and his Books and many of his Vouchers delivered up to the Factory at Bantam, without which he could not account; but the Company now offered that he should have the Use of his Books.

The Lord Chancellor diſallowed the Plea, and that the Defendant ſhould anſwer; for he ſaid that this differed from other Caſes, for it was a national Cauſe and Concernment, and nothing ſhould diſcharge the Factors in India, but a Releaſe or Diſcharge from the Company it ſelf, elſe their Agents may by mutual Connivance ruin the Company.

Another Point was, the Company impoſed a great Value on Commodities, prohibited by their Agents to be traded in, viz. five, ſix, or ſeven Times the Value; yet the Defendant ruled to anſwer tho' it were a Penalty.

DE
Term. Sanct. Mich.
Anno Regis 28 Car. II.
IN
CANCELLARIA.

Noy *contra* Ellis.

Mortgage - Money payable to the Executor or Administrator, and not to the Heir.
Vide ante 50, 51.
1 Chan. C. 283, 286.
1 Vern. 412, 271.
2 Ventr. 348, 351.

BOsistow mortgaged Lands to Joseph Noy and his Heirs; the Condition was to pay the Money at a Day to the Mortgagee, his Heirs, Executors, Administrators or Assigns; the Money was not paid, the Mortgagee entred and died; three of the Defendants, as his Heirs entred; Julian, Wife of the Mortgagee, takes Administration, then brings a Writ of Dower against the Heirs; and others bring Actions of Debt against the Heirs on Bonds, wherein the Mortgagee bound him and his Heirs; the Wife exhibits a Bill against the Heirs and the Mortgagor, that the Mortgagor may redeem, and the Heirs reconvey to the Mortgagor, and that she as Administratrix may receive the Money; and decreed accordingly.

The Objections against the Decree were, viz.

1. The Condition was to pay to the Heirs, Executors, &c.

2. The Mortgagee had entred, and by his Act, as far as in him lay, made it Part of the real Estate.

3. The Plaintiff by bringing a Writ of Dower had so done also.

4. There were no Debts, but Assets sufficient with Overplus.

5. Neither

5. Neither were any Children or Portions to be paid.

6. The Law gave the Estate to the Heirs, Sisters of the Mortgagee, and the Administratrix came not in by the Act or Disposition of the Mortgagee; and it were hard to take away a legal Estate from the Heir to give it to an Administratrix, who ought to be less favoured than the Heir, who always must be of the Blood. An Administration may be to a Stranger, and whether he be or not, his Title is the same only by the Ordinary.

The Precedent between Tilly and Egerton and others was cited.

Notwithstanding the Lord Chancellor decreed ut supra. He said he had considered all the Precedents, and held no Difference, where Payment was to be to the Heirs and Executors, &c. or to the Executors only: But in Case the Money had been paid at the Day of Payment to the Heir, there it was well to the Heir; but if it were not at the Day, then it should return to the Personal Estate, for it came from thence, and should return thither again, and said, it was needful that Point should be settled; and no Matter what the Law is, so it be certain, as Chief Baron Walter said; and concluded all Mortgages pertain to the Personal Estate though made in Fee. Ante 29, 30, 52; 220, &c.

Culpepper *and* Austin. Austin *contra* Culpepper.

SIR Thomas Culpepper the Father, the 29th of February, 1642. by his Will in Writing devised, That if all his Debts might be paid out of his Personal Estate, or out of the Rents and Profits of his Lands, then Henry Culpepper his Brother, and Sir Nicholas Crisp, who he recited to be estated in his Lands in Trust should convey his Lands to the Plaintiff, his Son, at his Age of one and twenty Years, and receive the Profits in the mean Time, and made them Executors and died, the Plaintiff, his Son and Heir, being an Infant.

And supposing the Executors had raised sufficient to pay the Debts, 1655, he exhibited his Bill against the Executors to have the Lands, being one and twenty Years of Age. This Bill was not prosecuted divers Years, and was grounded only on the Will, which in Truth was revoked by a Deed made by Sir Thomas Culpepper in March following in Trust, whereby the Lands were conveyed to them

them and their Heirs to ſell to pay his Debts; for by the Will the Executors had only an Authority to ſell, and that of two Parts; by the Deed they have the Eſtate not only of the two Parts, but of the Whole; and there were other Variances in the Truſt limited in the Will and Deed.

In 1660. the Plaintiff Culpepper exhibited a ſecond Bill againſt Henry Culpepper, the Executor, and others to the ſame Effect.

And a third Bill againſt Henry Culpepper the Executor, and Sir Robert Auſtin, to the ſame Purpoſe; but herein charged not only the ſaid Will, but that the Defendant pretending to the Lands ſome Title by ſome other Deed or Will had entred, &c. and prayed an Account.

Sir Robert Auſtin by Leaſe and Releaſe dated the 16, 17 July, 1661. by Advice of Serjeant Broom on Peruſal of the Deed made the 9th of March, 1642. after the Will (but it ſeems he was not acquainted with the Will) for a full Conſideration, viz. 1120l. (actually paid 900l. and the Reſt then ſecured) did purchaſe the Lands in Queſtion being not worth above 55l. per Annum; at this Time Sir Robert Auſtin was named Party in the laſt Bill; no Proceſs taken out againſt him till November, 1661.

Sir Robert Auſtin anſwered and died, Sir J. Auſtin, his Son and Heir, exhibits his Bill for Relief, ſuppoſing Colluſion between the Uncle of the ſaid Heir and him; and in Truth the Anſwer of the Uncle to the laſt Bill came in the 17th Day of June, 1661. the ſame Day wherein Sir Robert Auſtin purchaſed, and paid his Money; and the Serving Proceſs on Sir Robert Auſtin in November after; and it was proved that the Plaintiff offered Henry Culpepper Son of Henry, the Uncle, that he would quit his Father, Henry Culpepper, of all Accounts, and releaſe him if ſo be he would comply with him in the Accounts; for he ſaid he intended to lay the Burden upon Auſtin, and if he would ſo do he ſhould not want for 200 Angels; but the ſame Witneſs on the other Part ſwore he did not accept thereof, but faithfully managed the Account, Culpepper's Bill being brought to an Hearing againſt Auſtin.

The Lord Chancellor Aſhly heard that Cauſe, and on hearing ſeveral Orders made in Auſtin's Cauſe, directed an Account with ſpecial Directions, (inter alia) an Account made by the Uncle in Preſence of the Plaintiff to be conſidered.

Now, Auſtin's Cauſe coming to be heard by the Lord Finch, many Things were moved, and that this Cauſe could not receive any final Determination till the Accounts before the Maſter were ſettled, which depended by ſeveral Exceptions taken by Auſtin, whoſe Bill was not brought on by him, but by the Defendant Culpeper, Plaintiff in the other Cauſe.

There were divers Things agreed and reſolved: 1. That by the Truſt in the Will to ſell, the Purchaſer did purchaſe at his own Peril, if the Perſonal Eſtate and Profits of the Land receiv'd were ſufficient, and afterward became inſufficient. Truſt to ſell.

2. But if the Truſt were as in the Deed, the Purchaſer was ſafe; for the Vendor is liable, not the Purchaſer. If the Conveyance be to ſell to pay Debts, it pertains not to the Purchaſer in ſuch Caſes to inquire if the Debts be ſatisfied, eſpecially when no Schedule of Debts is made to ground his Enquiry on, elſe no ſuch Truſt could ever be executed.

3. But in this Caſe the Heir (who is intitled to the Lands after ſufficient is raiſed, to have the Lands by a Truſt implied, and a Truſt reſulting on Conſtruction of the Truſt though not expreſſed) doth attach his Claim by exhibiting his Bill, and then no Man may purchaſe after the Bill Lite pendente: And when the Bill was exhibited againſt Henry Culpepper, the Truſtee, it will bind him and all claiming under him, pendente lite; and it was improvident Counſel to make Auſtin Party to give him Occaſion to queſtion the Account, and however now the Account muſt go on. Lis pendens. Vide ante 85, 115, 116, 201. Nota; No Proceſs then ſerved.

But I objected, that then it will lie in the Power of the Heir to hinder or delay Sale or Payment of Debts, for he may exhibit a Bill when he will, and no Man can tell what the Event will be at the End of the Suit.

Anonymus.

Anonymus. 19 December 1676.

Parliament Privilege.
Barons Widows.
But 1676. resolv'd in the Lords House to the contrary, that the Widows had Parliament-Privilege.

THE Lord Chancellor Finch declared, that it was lately resolved by the Lords in Parliament, that the Widows of Peers ought to have no Privilege of Parliament, because they are not to be called to Council; and cited the Lady Mohun's Case, though formerly they had been allowed it; but they are to have Privilege of Peers, not to be arrested.

Of Noblemen, &c. and their Privilege, and how to proceed against them in Equity, vide Curs. Canc. 77, 78, 102, 110, 112, 490 to 506. 1 Chan. C. 221, &c.

DE
Term. Sanct. Hill.
Anno Regis 28 & 29 Car. II.
IN
CANCELLARIA.

Sims *contra* Urry. 25 January 1676.

THE Plaintiff had a Bond of 40 l. quadraginta libris, to pay 200 l. which should have been quadringentis. The Defendant was sued in Chancery as Heir and Executor to the Obligor, the Obligor having bound him and his Heirs. The Plaintiff had Relief, tho' the Defendant offered to admit the Bond to be 400 l. and so try it.

40 l. Bond to pay 200 l. aided.
The Heir charged here as by Judgment at Law he should have been.
Ante 93, 213, 217.
1 Chan. C. 84, 284.

The Lord Chancellor decreed an Account before a Master of the Profits of the Land from this Time, viz. of the Decree, because the Defendant offer'd not so in his Answer, and at Law on Oyer, the Variance would appear: Yet the Defendant offered not to demand Oyer of the Bond at Law; but it was now too late objected, the Heir could not be bound but by Writing, and this Writing binds him but in 40 l. and the Executor could not pay it without a Decree, without a Devastavit to other Creditors.

Lord Chancellor. When the Plaintiff hath Judgment here, he shall have the same Advantage as at Law.

Mistakes in Deeds, &c. aided, vide ante 43, &c. ib. Q. M. 36.

Perkins *contra* Avery, Brown *and* Baker.

Scrivener answerable on a fraudulent Sale.
Vide ante 77.
Post 242.
1 Chan. C. 94.

THeophilus Perkins, whose Executor the Plaintiff is, possessed of certain Pieces of Hangings, put them into the Hands of Avery an Upholster to sell for him; but having Occasion for Money, desired Brown, who was a Scrivener, to lend him 500 l. which he did on the Hangings, and enquired first of Avery, who was his Cousin and Neighbour, of the Value of the Hangings, who informed him of the Value: Afterwards Theophilus Perkins borrowed on the Hangings 100 l. more, and gave a Judgment also for the Debt with Interest, the Hangings being still in Avery's Hands. Avery sold the Hangings at an under Value, but whether Baker or Brown knew of the Sale? they pretended they did not, and denied that they knew: But Avery after his Sale desired the Plaintiff, then Executor of Theophilus Perkins, to sell them; who refused so to do, unless he might first see them, but could not; the Money lent by Brown was Baker's, for whom Brown dealt as Scrivener, as they said; but the Plaintiff, nor Theophilus Perkins his Testator did not know thereof, nor did Baker appear therein, tho' the Securities were in his Name: The Plaintiff paid the Money and Interest; the Note for Judgment, and for the Mortgage of the Hangings, were always in Brown the Scrivener's Custody, and on Payment of the Money delivered up to the Plaintiff: But the Hangings being sold before, could not be had; and Brown said he had nothing to do with Avery, (as one Witness deposed at the Payment, &c.) The Plaintiff exhibits his Bill to have the Hangings, or the Value in Money. On a Trial against Brown, Baker and Avery, directed by the Court, the Value of the Hangings was found to be 800 l.

The Lord Chancellor decreed the Defendants to pay the Money.

Brown and Baker petitioned to be re-heard, and that the Decree might be explained as to them only; that there was no Reason to charge them, for they put not the Hangings into Avery's Hands, but they were placed in Avery's Hands with Power to sell them by Theophilus Perkins, and they ought not to be charg'd by Avery's Default.

But my Lord Chancellor on long Debate affirmed his former Decree; for by the Sale and Mortgage Perkins devested his Property, and the Goods became Baker's, and Avery became Trustee for Baker, and he must answer for his Trustee Avery, who did sell them after the Mortgage.

And though Brown pretends to act as a Scrivener only, and as an Agent to lend Baker's Money, they are to be looked on as one Person as to the Plaintiff; for the Scrivener keeping the Securities for Baker, Baker trusted him thereby with all, and he had Power to dispose of the Monies, and he undertakes the same by keeping the Securities, and shall be answerable as Baker: And now after the long Proceedings, Orders, Reports and Trials, and Decree it is too late.

Anonymus. 23 February 1676.

MR. Attorney moved, that a Decree pronounced in Michaelmas-Term, That the Defendant should account, since which the Defendant was dead, might be enrolled.

Decree inrolled post mortem. Vide post 247, 248. Ante 161, 199.

(Lord Chancellor.) What good will that do you when it is but to account?

(M. Attorney.) The Decree was not only to account, but for Payment of certain Sums.

(Lord Chancellor.) It hath been done, and is so at Law, if Judgment be pronounced it shall be entred, tho' the Party die, let it be so here now.

DE
Termino Paſchæ,
Anno Regis 29 Car. II.
IN
CANCELLARIA.

Craker & Ux. *contra* Parrott & Ux'.

The Caſe on Proof.

Will.
See 1 Chan. C. 309.
1 Vern. 66, 415.
2 Chan. R. 141.
Ante 95.

RIchard Spior, a Citizen of London, had Iſſue four Daughters, viz. the Plaintiff by his firſt Wife, and three Daughters by the Defendant his ſecond Wife; and by his Will deviſed in theſe Words, (having given thereby ſeveral Legacies:)

As to the Reſt of my Eſtate, one third Part is due to my Children equally; therefore my Will is, that the Portions that I gave in Advancement of my married Children, ſhall be accounted in their Shares to make their Shares equal with my unmarried Children; one other third Part belongs to my Wife, and the other third Part which I have Power to diſpoſe; the Legacies by me given thereout deducted, I do intruſt my Wife with, during the Time ſhe ſhall continue my Widow; and in Caſe ſhe ſhall re-marry, I do will and deſire her to give unto my Children the Remainder of my Eſtate, according as ſhe ſhall think fit, **and dieth.**

The Widow marrieth again, the Remainder of the Thirds after Debts and Legacies, was 1670 l. &c. **The Executrix after her Marriage, by Writing recites, that her Daughter**

Mary, who had been married by her, and her former Husband, against her own Inclination, and her the said Mary's Husband left her one Child and no Maintenance, and was gone away; therefore she appoints to Mary 1074 l. to the Plaintiff 50 l. to the other two Daughters 257 l. apiece; so as Mary had 21 Times as much as the Plaintiff, and the other two Daughters five Times as much.

The Bill complains of this unequal Distribution, but was dismissed by Mr. Justice Jones; but an Appeal was now to the Chancellor, who re-heard the Cause, and set aside the Distribution as done contrary to the Trust which was reposed in her by her Husband.

Distribution. Vide ante 95. 1 Chan. Ca. 309. 1 Vern. 60. 413. 2 Chan. R. 141. M. 17.

The Points debated at the Bar were;

1st. Whether the Power left to the Wife was not determined by her Marriage, for the Words are express, that he intrusts her for so long Time, viz. as she shall continue his Widow; therefore she having no Power but by this Clause, she cannot have the Power of Trust longer than she continueth his Widow.

To which it was objected, That her Power to dispose was, if she re-marry, to give, &c. so she must re-marry, and then give, &c.

Resp. The Occasion of disposing is in Case of Marriage, which she may do before; as a Power to limit a Jointure to a Wife may be executed before Marriage, if Marriage follow: And Reason was for to trust her no longer than while she continued a Widow; for when she married, though she might direct, yet all the Estate falls under the Power of her Husband.

2dly. Admitting her Power ceased not in Point of Time by her Marriage, yet so great Inequality shewed so much Partiality to her own Children above the other Child, the Plaintiff, to whom she was a Step-mother, as that the Court ought to regulate it: Which it was urged the Court had Power to do, and to dispose, as the Father, if asked, would have done; and the rather in this Case, for that the Father when he published his Will, declared to his Wife what he had, and left her no Charge but the Plaintiff, and she said she would be kind to her, and deal with her as her own; and often in her Widowhood said, the Children should be equal.

This was much opposed; but my Lord Chancellor said in Effect, that he went on other Reasons than were touch'd on at the Bar; he considered not the Case as Matter of Power,

Power, but as a Truſt in the Wife, which was to keep the Children in Obedience to her while a Widow; but when ſhe ſhould marry, it was likely that the Reverence of the Children would not be ſo much as before; and therefore though he truſted her for the Children equally before, yet when ſhe ſhould marry, he ſeems to give her a more arbitrary Power; but that doth not make the Children rightleſs.

Decree againſt thoſe not Parties. Vide poſt 234.

Then was moved, there could be no Decree, becauſe the other Daughters were no Parties.

Reſp. They may come in before the Maſter, or however we deſire but that this unequal Diſtribution may be ſet aſide.

Note; Equity will in many Caſes control the unequal Acts of Truſtees, Guardians, &c. though by the Deed or Will they are veſted with a diſcretionary or arbitrary Power. See 1 Vern. 66, 355, 414, 415. 1 Chan. C. 309. 2 Chan. R. 141, 146.

I DE

DE
Term. Sanct. Trin.
Anno Regis 29 Car. II.
IN
CANCELLARIA.

Elliot *contra* Elliot. 3 July 1677.

THE Grandfather Mortgagee purchaseth to himself the Equity of Redemption; and having two Sons, the eldest took ill Courses, and had killed a Man: The Grandfather and the Mortgagor joined in a Conveyance to Thomas his youngest Son, but no Consideration expressed, nor Trust expressed; but the Grandfather continued in Possession, and leased and received the Rents, and by his last Will devised the Lands to Thomas, but expressed not for what Estate, and died.

Son trusted by the Father.
Q. Ante 53, 63, 78.
1 Chan. C. 176, 236.
M. 56, 7.

The Question was, Whether the Conveyance to Thomas should be taken to be in Trust for the Grandfather, according to the usual Rule, or no? And the Question arose between the Son of Thomas, and the Heir at Law.

Against the Heir at Law, and to make it no Trust:

1st. Where the Father purchaseth in the Name of his Son, it hath been frequently decreed to be an Advancement and not a Trust, though the Father take the Profits and keep Possession; and though the Father after such Purchase declare the Trust, yet it is not good unless the Trust be declared before or at the Time of the Purchase.

And so now the Lord Chancellor agreed.

2dly. It

2dly. It was objected, that the Reason why this Court had so as before decreed, was in Pursuance of the Reason of the Common Law: A Feoffment is made by the Father to the Son generally, no Use riseth back to the Father, unless it be expressed.

3dly. The Will expressing no Estate, contradicts not the Rule; but one Witness doth expressly depose, that the Grandfather's Direction was to devise, &c. to Thomas and his Heirs: And another Witness deposed ad idem, to the best of his Remembrance, and as he believed, which was not pressed as if such Parol Declaration could enlarge the Will, but as an Evidence of the Trust and Intent; and there was Reason to do so, because of the Disorder of the elder Son.

But the Lord Chancellor decreed it a Trust for the Grandfather, and took the Difference between a Son formerly married and provided for, and between a Son unprovided for. In the latter Case, if the Father purchase Land in the Name of a Son, and pay for it, or convey Land to his Son, it shall be taken not to be a Trust ut supra, but to be an Advancement or Provision for the Son, because the Father is under an Obligation of Duty and Conscience to provide for his Child in such Case; but after he hath provided for him, he is under no further Obligation to provide more than for a Stranger, and else no Father could trust his Child: And this Difference I take, and shall always observe, and the Proof is defective to alter the Case.

Anonymus.

Foreign Attachment.

EEward Turney was indebted to Edward Denham by Bond, and took of him divers Wares to barter and trade for in the East-Indies. Turney in his Return homeward dieth Intestate, possest of divers Goods in the Ship. Daws possesseth himself of the Goods, and Moyor gets them into his Possession. Anthony Turney takes out Letters of Administration, and he brings a Bill, Hill. 1673. against Daws and Moyor to discover the Estate. 13 March 1673. Moyor enters a Plaint before the Mayor, &c. of London, against the Administrator, on a Bond for Money, wherein Edward Turney the Intestate was bound to him, and hath Process thereon. The Officer returns that he had attached Anthony

Turney by Goods (naming them) in the Hands of Moyor, which were the Intestate's, and immediately Process on 14, 15, 16, 17, the same Days of the same Month of March, and the Goods condemned in four Days. Denham sueth the Administrator of the Intestate at Law, and by Nihil dicit obtains Judgment on the Bond. Daws doth the like on another Bond; but these Judgments were after the Judgment on the Foreign Attachment, and pending the Suit in Chancery by the Administrator: But Denham after exhibited a Bill against Turney the Administrator, and Daws; but Moyor was no Party to that Suit, and Daws had a Suit there against Turney, Moyor and Denham.

All three Causes came to be heard together: Decreed int' alia, for Daws and Moyor, to account for the Estate which came to their Hands, Books, &c. to be brought in, the Estate, over and above just Allowances, to be distributed proportionably among the Creditors, according as by Law they ought to be paid, and that the Judgment in the Foreign Attachment should be set aside, but the Goods returned for Denham's Adventure, to be no Part of Edward Turney's Estate. Moyor procures a Re-hearing, and insisted, that his Debt being by Bond, as well as the Debt to Denham and Daws, it was hard enough on him that the Judgment which he had on the Foreign Attachment was set aside, for he had therein done nothing illegal, and it was lawful for him to secure his Debt by any legal Course; but as the decretal Order is penn'd, he shall not only lose the Benefit of his Judgment, being first and precedent in Time to the other Judgments, but shall lose his Debt; for the other Judgments will be preferr'd before his Debt by Bond, unless he may aid himself by his Judgment on the Attachment: But he declared, and was contented that this Judgment should not prejudice the other Debts, but all to be paid ratably and proportionably, so that he might have a Share of the Estate equally, according to the Proportion of his Debt; but that as now the Order is penn'd, he will be wholly excluded till the Debts to Daws and Denham be paid, which may swallow the whole Estate.

Chancellor. If a Suit be begun in Banco Regis, Communi Banco, &c. no Foreign Attachment for a Debt, &c. shall prevent the Judgment of that Court, nor shall it prevent the Judgment of this Court, &c. and therefore I confirm the Decree made, and set aside the Proceedings and Judgment

on the Foreign Attachment: You forsook the high-way and mistook it, and went in a By-way, therefore take your Chance.

Decree against one who is not a Party. Vide ante 230.

Then it was objected, that the Administrator's Bill was not for Payment of the other Debts, but only to discover the Estate, and Denham no Party to that Suit of the Administrators, and Moyor no Party to Turney the Administrator's Bill; but Daws was, and Moyor no Defendant to the Bill of Denham, therefore he could not have any Decree against Moyor as now he hath.

Chancellor. They were all brought to hearing together, and Reason was that it should be so; and on hearing of them, the Justice which was to be done on them all appeared, and accordingly decreed, and you shall not sever them now.

For in all Cases where Conscience is the Judge, Equality is to be the Rule of Equity, vide ante 54, 117. 1 Chan. C. 295, 223, 248. Nor will Equity regard Forms or Orders of Court, where the Right, &c. is apparent. Vide ante 3. Post 251.

DE
Term. Sanct. Mich.
Anno Regis 29 Car. II.
IN
CANCELLARIA.

Hilliard *contra* Gorge, &c.

FErdinando Gorge did, by Articles sealed, covenant to pay Hilliard the Plaintiff's Father 2100 l. for his Interest in a Plantation in Barbadoes, with Covenants to enter into seven Bonds for the Money, 300 l. each Bond. Gorge enjoyed the Plantation, but no Conveyance made to him, but Hilliard died, and made Speake and Hely Executors, in Trust for the Plaintiff an Infant. 600 l. was paid: Hely (Five of the Bonds being due) delivered them up, and takes Bonds of the same Sums in the Name of himself and his two Co-Executors, and excuseth himself, because Gorge had receiv'd a Commission from the King to go to Suranam, &c. And to mend the Security, he took five new Bonds; but by this, 500 l. Interest was lost to the Infant.

Interest lost decreed.
Vide ante 150, 152, 153.
1 Chan. C. 211, 258, &c. ibid.

Lord Chancellor decreed the Payment to be made according to the Times of Payment in the first Articles; and Gorge and Hely to be charged therewith, notwithstanding that Hely had on taking the new Bonds released Gorge of the Articles.

Bray *contra* Buffield.

Term devised to A. for Life, and after to the Heirs of the Body of A.
Vide 1 Chan. C. 126, 146.
Ante 11, 168.

LEssee for Years devised the Lands to his Wife for her Life, after her Death to the Heirs of her Body; and for Want thereof to J. S. and dieth. The Executor consents to the Legacy, the Wife dieth without Issue: The Question was, Whether the Executor of the Husband or the Wife should have the Residue of the Term?

(Pemberton.) Had the Devise been to the Wife and the Heirs of her Body, the whole Term had been hers, and any Remainder void, and the Executors could have had nothing; but it is devised to her for her Life, and afterwards to the Heirs of her Body, in which Case she hath but an Estate for her Life, and after to her Heirs, &c. Now the Word (Heirs) is a good Word of Purchase, and the Heir of her Body shall take by Way of Purchase: Put Case the Devise had been to the Wife for Life, and after to the Heirs of a Stranger, there it should have vested when it fell, in the Heir of a Stranger as a Purchaser.

(Resp.) I suppose he meant that the Stranger, to whose Heir the Devise was made, was dead at the Time of the Devise, or at least at the Time of the Devisor's Death.

(Else quære.) And why not in this Case, when a Will may be expounded two Ways, and one Way the Testator's Will and Meaning will take Effect, but not if the Will be expounded the other Way, then that Exposition shall be taken, which stands best with the Testator's Meaning; for the Wife shall have it for her Life, and the Heir after as a Purchaser; but the other Way of Exposition excludes the Heir: In Case of a Freehold limited first to the Ancestor, and afterwards mediately or immediately; the Word Heirs are a Limitation; for Heir and Ancestor succeed, but not Heir and Testator of a Term, and the Remainder after the Limitation of an Intail is void.

Lord Keeper *contra*. The Testator meant an Intail to the Wife, which cannot be, because then there should be a Perpetuity of a Term; and though there be Difference in Words when Land of Freehold is devised to one for Life, the Remainder afterwards to his Heirs, mediately or immediately; and where a Term is so devised, the Difference is in Words, the Testator's Meaning is the same, and new

Estates, Jointures and Settlements, are of long Terms, and a Similitude is between them, &c.

Anonymus. 21 Novemb. 1677.

Pro confesso. Vide Curs. Canc. 1 Chan. C. 208. 3 Chan. R. 22. Ante 173. 1 Vern. 247. Tithes. Jurisdiction.

THE Suit was for Tithes in Chancery: The Defendant being in Contempt for not answering, was brought by several Orders to the Bar; and being indeed a Quaker refused to answer on Oath, but prays to answer without Oath.

Lord Chancellor did admonish him of the Peril, viz. that the Bill must be taken for true, entirely as it is laid if he answered not; but he saying as before, the Chancellor pronounced his Decree, tho' Sir John Churchill not being of Counsel, but Amicus Curiæ, said, that this Cause for Tithes, especially small Tithes, was not proper for this Court, and had not been used.

Chancellor decreed for the Plaintiff, and referr'd the Valuation to the Master.

Manaton *contra* Squire. *The same Day.*

Tenants in Common. Partition. Ante 64, 214.

A Partition between Tenants in Common of a great Waste decreed, tho' many Reasons tending to great Inconveniences, viz. Want of Pasture, Shade, &c.

Foster *contra* Denny. 4 Decemb. 1677.

The Case.

Guardian.

DUKE the Father deviseth to his Wife, Mother-in-law to his Son, the Custody and Tuition of his Son, an Infant of about seven Years of Age, and died: The Wife marries meanly, viz. her own Servant, and he dying, she married a very mean Person, Foster: The Uncle of the Boy gets Possession of him, and sends him into France, where he placed him in a Protestant College for his Education. The Court on Information that the Child was eloigned by the Uncle, sued out a Writ of Homine replegiando, and this Day was appointed to hear why the Writ should not be discharged.

Homine replegiando.

Lord

Guardians by Common Law and by Parliament.
See New Cases in Equity 103, 153.

Lord Chancellor. Where there is a Guardianship by the Common Law, this Court will intermeddle and order; but here being a Guardian by Act of Parliament, I cannot remove him or her; but in this and all other the like Cases, they shall give Security not to marry the Child infra annos nubiles, or consent, or be aiding to the Marriage of such post annos nubiles, during Minority, without acquainting this Court therewith; but I cannot restrain the Infant from Marriage ad annos nubiles, and the Uncle was ordered in this Case to send for the Boy home, &c.

Anonymus.

Master of a Ship.
Owner.
Freight.
Merchant.
Foreign Sentence.
Ante 36, 76, 130, 198.
1 Chan. C. 25, 76.

A Master of a Ship, so appointed by B. Owner, treats with the Plaintiff to take the Ship to Freight for 80 Tuns, to sail from London to Falmouth, and thence to Barcelona, without altering the Voyage, and there to unlade at a certain Rate per Tun: And to perform this, the Master obliges the Ship, and what was therein, valued at 300 l. and accordingly a Charter-party was made and sealed between the Master and Merchant, but the Owners of the Ship no Parties thereto: The Master deviates, and commits Barratry, and the Merchant in Effect loseth his Voyage and Goods; for the Merchandize being Fish came not till Lent was past, and was rotten: The Merchant's Factor hereupon sueth the Master in the Court of Admiralty at Barcelona, and upon an Appeal to a higher Court in Spain, hath Sentence against the Master and Ship; which coming to his hands, viz. the Merchant's hands, the Owner brings an Action of Trover for the Ship; the Merchant sueth in Chancery to stop this Suit, and another Suit brought by the Owner for Freight, claiming Deduction out of both for his Damages sustained by the Master by Breach of the Articles by the Master; for if the Owner gives Authority to the Master to contract, or doth allow his Contract, he shall be liable to Loss as well as Gain by Occasion of that Contract; and if he will have the Gain, viz. the Freight by the Master's Contract, he shall also bear the Loss; and a Contract made by my Counsel is as if I make it my self. Indeed in Case of Bottomry after a Voyage begun, the Master cannot oblige the Owner beyond the Value of the Ship, but this Case is, ut supra, on Contract.

Lord Chancellor. The Charter-party values the Ship at a certain Rate, and you shall not oblige the Owner further, and that only with Relation to the Freight, not to the Value of the Ship; the Master is liable for Deviation and Barratry, but not the Owners, else Masters should be Owners of all Mens Ships and Estates.

Keck. If the Owner had been Party to the Charter-party, and covenanted there should be such Proceedings in the Voyage, he should on Non-performance thereof have been liable to the Damages, and the Valuation of the Ship in the latter Clause, viz. obliging the Ship to the Performance, would not excuse or lessen the Damage, and the Owner by assenting to the Act and Agreement of the Master obligeth himself.

Lord Chancellor decreed ut ante.

The Lady Mary Cope's *Case.*

THE Lady Mary Cope being a Lunatick, and on Inspection found so, was committed to Mr. Guy, at the Request of the Countess of Bath; and now Sir Francis Fane her Uncle, and Aunt, their Sister by the Half-blood, petitioned the Lord Chancellor for the Custody; first, for that she was nearest in Blood; the Estate was but a Jointure for Life, so as no Impediment, as in Case of Guardianship where Lands may descend: And Nearness of Blood argueth most Nearness of Affection; especially Guy being a Stranger: And she could not be thought to design against the Life of the Lunatick, and she on her Death was best intitled to the Administration of the Estate, and consequently most engaged for the Preservation of it.

Lunatick, who to have the Custody. Vide ante 70. 1 Chan. C. 113, 153. 1 Vern. 9, 105, 155, 262, &c. 2 Vern. 192, 414.

Lord Chancellor. It is no Question of Right, but of Prudence; and where no Right, there is no Wrong: It shall never in this or any Case be committed to any that will make Gain of it; and the Sister tho' she be not intitled to the Estate, yet is concerned to out-live her, for thereby she will be intitled to the Estate, and therefore settled it as before; adding, that the Sister should be called to the yearly Account before the Master.

Vide ante 3. Post 251.

Then

Then we preſſed that Mr. Guy might be ſtinted, beyond which he might not exceed.

Chancellor. Move that when the Account is made, then the Certainty of the Eſtate will beſt appear; the Allowance muſt be liberal and honourable.

DE
Term. Sanct. Hill.
Anno Regis 29 & 30 Car. II.
IN
CANCELLARIA.

Taylor *contra* Rudd. 5 Febr. 1677.

Catching Promiſe. Vide ante 15, 17, 120, 121, 136, 177. 1 Vern. 120, 167. 1 Chan. C. 202, 276. M. 52. Vern. 60.

THE Defendant, four Days after her Husband's Death, was asked by the Plaintiff, whether she would marry again? and he gave her a Guinea to have ten Guineas for it if she married again. And now she being married, the Plaintiff ſued her and her Husband to diſcover the Promiſe.

On Demurrer it was inſiſted on by Sir J. Churchill and others, that it was a catching Promiſe, and like to a Wager, which this Court will give no Help at all unto, and was gained from her in her Sorrow, and ten for one is not a conſcionable Bargain.

(Jones Attorney.) The Difference is where it is a Bond Penal, whereon the Jury can give no leſs than the Penalty, and this Caſe, where the Jury will, as Cauſe is, leſſen, &c. The Demurrer was over-ruled, and the Defendant to anſwer.

Atterbury *contra* Hawkins, &c.

Scrivener not privileged.
Vide ante 38, 77, 226.

TWO Brothers, in the Life of their Father, (R. Jason) agreed by Articles together, That if the Father should leave or convey his Estate to the eldest, he should convey a third Part thereof to the younger Son; and if he should convey, &c. to the younger Son, then the younger Son should convey a Proportion, &c. to the elder. The Plaintiff pretends himself by this Bill to be interested in this Agreement under the younger Son, and Hawkins one of the Defendants is charged to know and to discover Incumbrances on the Estate made by the Father, &c. Hawkins demurs, because he was a Scrivener, and knew nothing but as a Scrivener when employ'd in lending Money, and taking Securities from the Father, &c. and demanded Judgment if he should discover, &c. insisting that it was a general Case concerning all Scriveners, and all Dealers with them, in lending and borrowing of Monies. The Demurrer was over-ruled, and Hawkins put in an Answer. To which Answer Exceptions were taken, and now came to be heard. The Defendant Hawkins hath now set forth in his Answer the Names of the Persons for whom he dealt in this Affair, namely the Bishop of Salisbury and others; so as the Plaintiff might make them Parties who are the Parties concerned in Interest; but he himself disclaimed all Interest, but did not answer what Conveyances he had made, nor for what Sums.

And it was said by Mr. Attorney, Mr. Keck, &c. That this would be a Foundation of a Practice of very ill Consequence, viz. when that the Party concerned may defend himself, so as coming in by valuable Consideration and without Notice, he should not be compell'd to discover any Thing to prejudice or weaken his Title, if he were himself Party to the Bill; yet by a Bill against his Agent, (for a Scrivener in such Case is no other) he shall have every Thing discovered: And it was said, that the Plaintiff's Design was, and his Endeavour had been to buy in some Incumbrances precedent to the Assurances made to his Clients, (so he called his Employers:) Besides, the Defendant having disclaimed, the Plaintiff could have no Decree against him, nor any Advantage by his Answer; for no Use thereof can be made against any others, and therefore it were better and more

proper to make the other Persons, whose Names are discovered in the Answer, Parties, and put them to answer for themselves, than the Scrivener, no Way interested, but as an Agent for others; and by this Way a Man that is a meer Stranger in Interest, and knows only as a Witness, may be drawn in to answer a Bill, and so either prepared to be a Witness, or searched by his Oath what he can say, &c.

(Sollicitor.) By the Order on hearing the Demurrer, the Defendant was to answer, and to discover, but now would bring the same Matter into Debate again.

Chancellor. The Bill is for Discovery, and in Effect the Defendant bids the Plaintiff go look; therefore answer what Conveyances himself made, not to the former. Bill of Discovery.

Of Bills of Discovery in Equity, &c. vide Curs. Canc. 125 to 129. What a Defendant shall not discover, vide Curs. Canc. 225, 397. And if a Discovery be prayed, 'tis Cause of Demurrer, ibid. 206 to 223. Or it may be avoided by Plea, ibid. Vide ante 47, 48. 1 Chan. C. 36, 156.

DE
Term. Sanct. Trin.
Anno Regis 30 Car. II.
IN
CANCELLARIA.

Anonymus.

Redemption bar'd, but no Poſſeſſion to be decreed.
Ante 23, 29, 61.
Poſt 148, 149, 165, 171.

A Mortgagee ſues to have his Money, or that the Defendant be barred of Equity of Redemption. It happen'd that by ſubſequent Orders Poſſeſſion was ordered to the Mortgagee, and Contempt proſecuted for not delivering the Poſſeſſion; and the Heir who was ſo proſecuted, ſet forth in his Examination a Title: And now the Mortgagee would have debated the Title, but not admitted, becauſe the Courſe of the Court is, and the Court can go no further in ſuch a Bill but to take away the Equity of Redemption, and leave the Plaintiff to ſuch Title as he hath, but not to amend it; and this was the true and antient Courſe, tho' of late ſome Times the contrary hath been done.

And now the Lord Chancellor agreed thereto, and diſcharged the Contempt.

Sir Robert Henly *contra* —— 12 June.

Guardian not advantaged by Bargain.

Decreed if a Guardian to an Infant, whose Lands are incumbred with Arrears of Rent to the Value of 600 l. and he hath in his Hands of the Infant's Estate 100 l. and buyeth the 600 l. Arrears, for 100 l. he shall not charge the Infant with the 600 l.

Touching the Duty and Obligation of Guardians in Equity. Vide ante 131, 137, 199, 211, 238, 239. 1 Chan. C. 157, &c.

Ne exeat Regnum. 1 Chan. Cases 115, 116. Curs. Canc. 49, 454, 5. 2 Vent. 345.

A Writ of Ne exeat Regnum granted in any Case where there is Danger of Subterfuge from the Justice of the Nation, though of private Concernment.

D E

DE
Term. Sanct. Mich.
Anno Regis 30 Car. II.
IN
CANCELLARIA.

Moore *contra* Bennett. 14 December 1678.

Notice implicit.

A. Makes a Conveyance to B. with Power of Revocation by Will, and limits other Uses if A. dispose to a Purchaser by the Will: Another Purchaser subsequent is intended to have Notice of the Will as well as of the Power to revoke, and this is in Law a Notice: And so it is in all Cases where the Purchaser cannot make out a Title but by a Deed, which leads him to another Fact, the Purchaser shall not be a Purchaser without Notice of that Fact, but shall be presumed cognisant thereof; for it is crassa negligentia, that he sought not after it.

Touching Notice. Where necessary or not, &c. vide ante 6, 20, 47, 48, 122, 126, 136, 156, 161. 1 Chan. C. 34, 35, 38, 143, 232, 252, 291, &c. ibid.

DE
Term. Sanct. Hill.
Anno Regis 30 & 31 Car. II.
IN
CANCELLARIA.

Wakelyn *contra* Warner. 13 February.

A Man seised in Fee devised Portions to several of his Children or Friends, payable at several Times by 50 l. per Annum, with which Sums he charged his Lands to be thereout paid, and died. 50 l. one Payment incurred due, then the Lands were alien'd by Fine, with Proclamations, five Years passed: The Devisee sueth here for the Whole, and the Decree was for the Plaintiff, for what grew due after the Fine was barr'd by the Fine, but not the 50 l. due before; for a Trust is barred by Fine, &c.

Fine bars Equity. See 1 Chan. C. 49, 211, 213, 278, 294. Ante 64, 125.

Warren *contra* ——

GEorge Warren mortgaged a House in Exon for 3000 Years to Boughton, in Trust for Francis, Arthur. George died, Thomas his Son took Administration to George, and Francis died, and Hester took Administration to him: Thomas Administrator to the Mortgagor sueth Hester Administratrix of Francis; and Boughton to redeem Hester, pleads that it was no Mortgage, but an absolute Purchase; but the Plea was set aside on hearing, December and January 1677. On Rehearing the Court decreed

Inrollment staid. Post mortem. Vide ante 199, 227. Administrator obtained a Decree, and dies Intestate.

Decree when to be enter'd, &c. Ante 161, 227.

decreed the Eſtate redeemable, but there being other mutual Demands, the Eſtate was by Decree to be convey'd by Heſter, and Boughton the Truſtee, to the Six Clerks to be under Diſpoſition of the Court, and a Security of what ſhould be due on the mutual Demands, and Bills to be exhibited for clearing theſe Demands, and a Maſter to take the Account of the Mortgage.

The Maſter took the Account, and certifies the Mortgagee over-paid by Profits 280 l. which was now due to Thomas.

In October 1678. the other Cauſes coming to be heard, the Plaintiff Thomas made a Propoſition that he would quit the 280 l. ſo as Heſter and Boughton would aſſign the Term and all their Intereſt therein to him, his Executors and Adminiſtrators. Heſter in Perſon takes Time to conſider, and then conſents; and the Court by Conſent of her and her Counſel, and of the Plaintiff Thomas, decrees her quit of the 280 l. and to aſſign to Thomas, his Executors and Adminiſtrators, and Boughton to join, and Thomas to releaſe to Heſter and her Heirs his Right, in certain Iriſh Lands.

Before Inrollment Thomas dieth, his Wife takes Adminiſtration to him, and now moved that the Decree might be inrolled, viz. 15 Jan. ſo as there was no Laches; for there hath no Term paſſed ſince October laſt, when the Decree was pronounced, and the Decree is the Act and Judgment of the Court, the Inrollment the Clerk's Buſineſs, and the Decree is, that the Land be conveyed to Thomas, his Executors and Adminiſtrators, which the Wife now is.

It was oppoſed;

Firſt, Becauſe Thomas had Right but as Adminiſtrator to George, which the Wife of Thomas cannot have as Adminiſtratrix to Thomas.

Secondly, The Releaſe cannot now be had to Heſter, for ſhe is Heir to Francis, and George and Thomas.

The Lord Chancellor denied the Inrollment, for the Title of Thomas as Adminiſtrator is gone.

Then it was prayed, ſeeing that now the Adminiſtrator by Suit of Thomas hath Benefit, Conſideration be had of Thomas his Coſts, but denied.

Everard *contra* Warren.

Quære 2 Chan Rep. 151, 192. 3 Chan. Rep. 87.

THE Defendant on Account shall be discharged by his Oath of Sums under 40s. but a Party shall not by Way of Charge charge another Person so.

Accountant discharged on Oath.

Everard, Owner of some Parts of a Ship, took up several Sums of Money on Bottomry: The Defendant became bound with the Plaintiff for the Money; the Plaintiff furnished the Ship with Merchandise: The Defendant takes the Ship and Goods, and imploys them.

Brown *contra* Hamond. 18 January 1678.

Fens. Unreasonable Sale not relieved.

THE Plaintiff sets forth, That he was seised of 300 Acres of Land in the Fens, which he demised to Allison at 50l. Rent for two Years, and after at 60l. Rent. The Lessee covenants to pay all Taxes, 30l. Tax was imposed, and 3l. Penalty incurred: The Lessee having sufficient Rent in his Hands to pay the 33l. combined with the Defendant, one of the Conservators, to defeat him of his Inheritance, and forbore to pay the 33l. The Officers appointed to sell by the Laws of the Fens sell 100 Acres of the 300 for the 33l. to the Defendant, a Commissioner: Whereas the 100 Acres were worth 400l. to be sold.

The Defendant denieth Combination, and pleads to the rest the Statute of Draining, and that the Sale was made according to and by Virtue of those Statutes.

No Relief in Equity against an Act of Parliament. Vide 1 Chan. C. 56, 205, 228.

The Lord Chancellor allowed the Plea, for he could not relieve contrary to an Act of Parliament; and if he should it would destroy the whole Oeconomy of the Preservation of the Fens; and compared it to the Case of a Mortgagor of Houses in London of great Value, that should be settled by the Judges, according to those Acts made concerning London to be rebuilt; This Court shall not examine any Sale on Pretence of Equity.

Note; The Sale is made four Monthys after Default of Payment, twice in the Year, and their Use is to expose first ten, or fewer or more Acres for the Sum in Arrear, and so increase till a Chapman offer, &c. and never sell for more than what is in Arrear of the Tax and Penalty, and it seems can sell for no more.

Anonymus. 21 January 1677.

Examination in Chancery used in Delegates.
Vide ante 80, 81, 84, 214, 217, &c.

On Appeal between Gargrave *alias* Fan, *and* ——

The Judges and Civilians on Debate ruled, that the Testimony of one Nevill, who was examin'd in Chancery between the same Parties, and cross examin'd there, should be read before the Delegates; though it was objected, that the Appellant here should take the Advantage here, which he should have had if he had been cross examined; for cross examining a Witness sets him upright in Chancery, but not here.

Shuter *contra* Gilliard.

Marriage Contract, &c.
Vide ante 17, 209, 215, 216.

The Defendant was Servant and Kinsman to Mr. Shuter of the Inner Temple, deceased; and marrying the Daughter of Harrison, Shuter promised to give or leave to the Defendant as much in Money or Value, as Harrison did or should give in Portion to him, and made his Wife Executrix, and died. The Defendant sued the Wife, &c. on the Promise; the Wife exhibited her Bill to discover the Truth of the Promise, (for it was, if any, a very unlikely one; for Harrison might give 5000l. or more,) and to discover what Harrison did give, and found that in Truth he had given little, and prayed Relief on the Bill; but the Defendant proceeded to Trial, and the Promise being a Collateral Promise, and not for Shuter's own Debt, and being made but a short Time before the Statute of the 24th of June 1677. a Special Verdict was found on that Matter, and therein it was also found that Harrison had given in Money and Value 2000l. and 2000l. Damages assessed.

Verdict pleaded.

There-

Thereupon the Executrix prayed to amend her Bill, and having order so to do, set forth her Verdict, and alledged that the Plaintiff Gilliard made up the Value by Jewels, valued ——and by a Mill which was valued at 1000l. and was but 30l. per Annum, and worth to be sold or otherwise, but 400l. and now prayed Relief. To which the Defendant pleaded the Verdict, and that thereby the Promise was found and Damages, and that Harrison had given prout.

On hearing the Demurrer and Plea, the Plea was allowed, and that no Examination should be had as to the Value of what Harrison had given: Notwithstanding the Plaintiff here examin'd to the Value of what Harrison gave, but the Defendant here, as was said in Regard of the Order, did not examine thereto, and so should be surprized, insisting on the Verdict, which expressly found the Value, &c. Examination. Ante 209.

To which it was alledged, that the main Defence being the Matter in Law, they ought not to be concluded by the other Matter, and offered to read Proof to such Effect.

Lord Chancellor. Where there is Right and Equity, Forms of the Court and Orders shall not hinder me to examine it; and it was so ordered.

Vide ante 3. a like Saying of the Chancellor. For Equity will not suffer a Right to be without a Remedy. See 1 Chan. C. 79, 144, 147, 184, Mo. 805. 4 Leon. 4, 184. 1 Roll. 374. pl. 4, 375. pl. 3. 377. pl. 12. 12 Co. 113. But where there is no Right there can be no Wrong, &c. Vide ante 239.

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SELECT

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THE

THE Duke of Norfolks CASE,

Or the Doctrine of PERPETUITIES.

A. Bargains and Sells to L. the Baronies of Gr. and Br. for 10 Months. 20 Martii. 1647.

A. Grants the Reversion of those Baronies to R. and D. and their heirs to the use of A. for life. Remainder to E. the Wife of A. for Life, Remainder to R. and D. &c. for 200 years upon trusts, to be declared by another Deed of the same date, Remainder to H. H. his second Son and the heirs Males of his body, Remainder to C. H. his third Son, and the heirs Males of his body, Remainder to E. H. his fifth Son, and the heirs Males of his Body, Remainder to A. H. his sixth Son, and the heirs Males of his body, Remainder to B. H. and the heirs Males of his body, Remainder to the right heirs of A. 21 Martii. 1647.

L. Attornes Tenant to R. and D. &c.

A. makes another Deed declaring the Trust of the Term for 200 years reciting it, and the uses in the last-mentioned Settlement, says in the reciting part, That 'tis intended that the Term should attend the Inheritance, the Profits be received by H. H. and the heirs Males of his body; and for default of such Issue, such other persons, who according to the limitation of Uses, should have had them if no such term had been, so long as T. H. Eldest son of A. or any Issue Male of his body shall live. But in case T. H. die without Issue of his body, in the life of H. H. not leaving his Wife ensient with a Son, or that after the death of E. H. by failure of Issue Male of T H. the Honour of A. should descend on H. H. then H. H. and his heirs to be excluded of the Trust, then the Indentnre witnesseth, that the Term shall be upon the Trusts

and under the restrained Limitation and Proviso's after-mentioned, viz. If T. H. or any Issue Male of his Body be living, in trust for H. H. and the Heirs Males of his Body, until by the Death of T. H. without Issue Male, and not leaving his Wife ensient with a Son, or after his death, by failure of Issue Male, the Honour of A. descends to H. H. and in case the Honour shall not descend to H. H. that after the Death of H. H. the Trust shall be for the Heirs Males of H. H. and for Default of such Issue in tryst, to permit such other Persons and their Issue Male respectively, to whom the Freehold or Inheritance is limited by the former Deeds, to take the profits, as if no such Lease were. And in case the Honour of A. descend upon H. H. then the Trust for H. H. and his Issue Male to cease.

And then as to the Barony of Gr. in trust for C. H. and the Heirs Males of his Body, Remainder to C. H. and the Heirs Males of his Body, Remainder to F. H. and the Heirs Males of his Body, Remainder to B H. and the Heirs Males of his Body, Remainder to H. H. and the Heirs Males of his Body, Remainder to the right Heirs of A. the Father.

And as to the Barony of Br. as to one third Part of it, in trust for E. H. and the Heirs Males of his Body, Remainder to F. H. and the Heirs Males of his Body, Remainder to B. H. and the Heirs Males of his Body, Remainder to T. H. and the Heirs Males of his Body, Remainder to H. H. and the Heirs Males of his Body, Remainder to the right Heirs of A. And as to another third Part of the Barony in trust for F. H. and the Heirs Males of his Body, with like Remainders to the other Brothers, ut supra: Remainders to the right Heirs of A. And as to the other third part, in trust for B. H. and the Heirs Males of his Body, with the like Remainders to the rest of the Brothers, ut supra.

A. died in 1652.

E. the Wife of A. died in 1673. and then the Term of 200 years commenced,

20 Novemb. 1675. D. the surviving Trustee at the Request of H. H. assigned the Term to one Marriot.

1 Dec. 1675. Marriot assigned the Term to H. H.

24 Octob. 1675. H. H. by Bargain and Sale enrolled, sells to M. to make him Tenant to the Precipe for suffering a Recovery.

25 Octob. 1675. The use of the Recovery declared to be to H. H. and his Heirs.

Nov. 1677. T. H. the eldest Son of A. died without Issue or having ever been married.

Query. If the Trust to *H. H.* be good, and the other Trusts limited to the other Brothers on the Contingent, in case *T. H.* died, whereby the Honour of *A.* should descend to *H. H.* be good or void, relievable or not relievable in a Court of Equity, the Term being surrendred?

Serjeant *P...ton's* opinion 26 Dec. 1677. I am of Opinion, that the Trusts to all the Brothers of H. H. in his Term are void, and no ways relievable in Equity: For if these

these Limitations, being made after T. H. shall die without Issue Male of his Body were good in their Original Creation to the Brothers of H. H. it must be by the attendency of the term upon the Reversion of the Estate which was so intailed, and then when their Estates in remainder were docked by the recovery which H. H. suffered, and the Trusts that attended on them were likewise destroyed, and can never survive the Remainder on which they depended, no more than they could have stood alone in their Original Creation.

Serj. M---d's opinion 28 Dec. 1677.

I conceive that the Trust for the Term is appointed to wait upon the Inheritance in the fore-part of the Deed, though seeming contrary to the latter-part is not so, but both may be reconciled (that is to say) shall wait upon the Inheritance upon such Contingencies as hereafter is expressed, being the Trust is limited and in the same order, only the Contingencies of the Death of T. H. without Issue, &c. prout.

Regularly a Term for Years cannot be entailed.

The Trust of the Term limited to H. H. and the Heirs Males of his Body, with Remainders over as the Case is, I think is a good Trust, and will go accordingly, so long as there is no charge made, though regularly a Term for years cannot be entailed, yet it may be made to wait upon the Inheritance that is intailed.

But when it is so limited, 'tis not properly an Intail within the Statute de Bonis, but governable partly in Equity, and partly in Law.

H. H. to whom it is so entailed may dispose of it, and thereby bind his Issue without Fine and Recovery, as I conceive. And the Term so limited in tail, shall be subject to his Debts against the Issue in tail, as I also conceive.

By the Recovery suffered by H. H. all the Intails are barred, and consequently the waiting of the Term upon the Inheritance destroyed, because the Inheritance it self is changed; but the bare surrender of the Trustee could not have that Operation if nothing else had been in the Case.

But the greatest question in this Case, I conceive, will arise upon the Death of T. H. without Issue and the other Contingencies, because the Trust of the Term is not limited to H. H. absolutely, but to cease upon those Contingencies, and then to be altered; yet seeing the main Intention of the Settlement was to make the Term wait upon the Inheritance, as by the Recital of the Deed, and when it changes is limited by Way of Inheritance.

Therefore I conceive that H. H. whilst he was owner of the Inheritance and trust of the Term, suffered a Recovery, the Contingent trusts of the Term to the others are destroyed.

In Law they have no Relief, because the Estate for years is surrendred, and I conceive the Chancery will not support such leaping Limitations of a Term for years, especially when it cannot take effect in toto, as the contingent Limitations are, and the Remainders in that case will be void.

M---d.

Sir *William Jones*'s opinion 20 Jan. 1677.

A Truſt of a Term cannot be Intailed, unleſs it be to attend an Inheritance.

I am of Opinion that the Term being limited to H. H. and the Heirs of his Body under other Limitations than the Inheritance was, the whole Term veſted in H. H. and the Limitations thereof to the other Brothers were void: For a Truſt of a Term cannot be Intailed unleſs it be to attend an Inheritance; and the Limitations of the Truſt differing from the Limitations of the Inheritance, 'tis all one as if the Truſt of the Term was Limited, without reſpect to any Inheritance, in which Caſe the Limitations of the Term to the other Brothers would be clearly void. Next I take it to be clear, that taking the Truſt of the Term to be attendant to the Inheritance of the Recovery, having barr'd the Remainders of the other Brothers as to the Inheritance, the Truſt of the Term muſt needs be wholly in H. H. and that the other Brothers can never claim the ſame in Equity: For ſince the Inheritance (as intendant to which they could only be Entitled to any Part of the Truſt of the Term) is veſted wholly in H. H. and no remainder left in the Brothers, there can be no Remainders in any of them of the Truſt of the Term; but as the whole Inheritance is now in H. H. ſo doth the whole Truſt attend that Inheritance.

W. Jones.

Sir *William Jones*'s opinion 30 Oct. 1680.

Limitation of a Truſt of a Term under Contingencies, void.

I am of Opinion, that the now Duke of Norfolk and Earl of Arundel, have a good Title to the ſaid Baronies. Firſt, in Law 'tis clear, that the Term is Surrendred; and ſo if any Title remain to the younger Brothers, it can only be in Equity. And Secondly, I think there is no Title in Equity, as to which it may be inſiſted upon, that if the Limitations of the Truſt of the Term were at firſt good; yet ſeeing they are chiefly to attend the Inheritance, and that Inheritance by the Recovery is changed and made a Fee Simple, and this before the Contingency in the Limitation of the Truſt of the Term happened, whereby the Limitations of the Truſts are changed, and the younger Brothers cannot have the Term in the ſame plight, nor during the ſame Eſtate, as were at firſt deſigned. I ſay, from theſe Conſiderations it may be concluded, that the Limitations of the Truſt of the Term are deſtroyed; but that which I do moſt rely upon, is, that the firſt Limitation of the Truſt of this Term under this Contingency, was altogether void; as to which, the Caſe is no more than that a Term of 200 years is granted in Truſt, that H. H. and the Heirs of his Body ſhall receive the Profits, until by the Death of T. H. and the Failure of Iſſue Male of his Body, the Honour of A. ſhall come to H. H. and in caſe the Honour of A. ſhall deſcend to H. H. then the Truſt for him and the Iſſue Male of his Body to ceaſe; and then 'tis limited reſpectively to the younger Brothers, and the Heirs Males of their reſpective Bodies; I conceive theſe Limitations to the younger Brothers are void. Firſt, it will be agreed, that the Limitation of the Truſt of a Term to one and the Heirs Males of his Body, and for want of ſuch Iſſue to another is void. As to the Second, I think it as clear,

clear, that if a trust of a term be limited to one, as long as John a Styles hath issue of his Body, and that John a Styles die without Issue of his Body, then to another, that Remainder is void: Likewise that which seems to make the doubt in this present Case is, that the Contingency must happen within a Life (viz.) the Honour of A. descend to H. H. which must be to him in his life-time, or not at all. To which I answer, that though a Contingency be remote in it self, and not likely to happen within a Life, the time within which it ought to happen, or not at all, doth not alter the case, and therefore in Child and Bayly's Case, reported in 2d Croke, 459. and by Jones and Palmer, the Failure of Issue was Limited to be within a Life (viz.) a term was devised to one and his Assigns, and if he die without issue of his body living at the time of his death, then to another: this was adjudged no Remainder unto that other; and though 'twas objected that the Contingency must happen within the compass of life, or not at all, yet no regard was given to that. this Case seems to me in reason to be the same with ours. I do observe, that no Case can be found, where Limitation either by way of trust or Devise of a term hath been allowed to take effect upon a Failure of issue, or after death of the party to whom the first Estate was limited without issue. And as in Child and Bayly's Case the Judges say, as I have often heard them say in other Cases (that if Matthew Manning's Case was now to be adjudged, it would not be so adjudged; and that Case is) a term is demised to one for Life, and after his death to another, which is allowed good, and that they would not go a step farther. So I say, in this Case it must go further than Manning's Case, or any other Case that adjudged to make it void. William Jones.

Serj. M---d's opinion 20 Nov. 1680.

The Case is new, and without any express Precedent, and therefore not capable of so certain a determination as would be expected, in Case advice were to be given, whether a Purchaser should deal in the buying of a Lease or not.

Yet though there be no Precedent in Print, yet such like Cases have been determined as guide my Judgment and Opinion to be (scilicet) that as this Case is circumstantiated, Charles hath not, nor can have a right to the trust of the term, the reasons and ground of my Opinion is as followeth.

Trust of a Term cannot be Intail'd, yet if the Inheritance be Intailed, the Term may be Limited wait on the Inheritance.

First, The trust of the term for years in gross, and separate from an Inheritance, cannot be intailed in Possession or Remainder; but yet where there is a term for Years in being, if the Inheritance of the Land be Intailed with Remainders over, there the term may be limited to wait upon the inheritance, according to the several intails; and such limitation is good, so long as nothing intervenes to interrupt or disturb it.

But I conceive is not capable of such Privileges of intail as Inheritance is, for the intail is confirmed by the Statute of Westm. 2d. de bonis; but the attendance of the term upon the Inheritance intailed is not within the Statute de bonis, &c. is but a Creature of the

Chancery, and in several Cases may be destroyed and barred, though no Fine and Recovery or other Bar be made of the Inheritance.

I conceive in such case if the Tenant in tail alien without Fine or Recovery for valuable consideration, the issue in tail shall avoid the Inheritance, the Chancery shall never help him to avoid the Leafe.

In this particular Case it is clear, that neither Charles nor any in Remainder, can recover this term at Law, but only by suit in Chancery; and in Chancery shall never recover where the limitation of such a term in being is not supportable in Common Law, which in this Case it is not, as I conceive; for take the Case without the Contingency, that Henry was tenant in tail, Remainder to Charles in tail, &c, the Recovery suffered by H. would have barr'd Charles of the rest of the term, as well as of the Inheritance.

But the sole Objection here is, that the trust of the term to Henry is expressed, that it shall determine quoad Henry and his issue, in case Tho. Duke of Norfolk dye without issue, living Charles, as in this Case he did.

The strength of this Objection lies in this: First, that the Cesser of the trust is to be upon the death of a Stranger without issue (scil.) on Tho. Duke of Norfolk, on whom the Lands were not Intailed. And secondly, the term is not to cease, but upon the death of Tho. Duke of Norfolk without Issue in the Life of Henry.

As to the first, it will make no difference in Reason and in the polity of the Law, where the Cesser is limited on the death of a Stranger without issue, or of the tenant in tail without heir of his body. For first,

In both Cases the possibility is remote, and not regarded in Law, where a term is so limited, and so were there solutions in Child's and Bayly's Case, and divers others.

This would be a way to set up a perpetuity, as strongly as that it was limited upon the death of the tenant in tail without Issue.

Put the case there be a Father and several Sons A. B. & C. and the Father is seized in Fee of the Reversion of Lands after a Lease of 200 years, he settles the Inheritance upon his eldest Son in tail, with Remainders in tail to his other Sons; and this Lease being in trustees for him at the same time, causes the Lease to be settled in trustees in trust for the Sons, to wait on the Inheritance in trust accordingly, provided that the second Son dye without Issue in the life of the Father or Son, the trust of the eldest Son to cease.

I conceive this would not be maintained in Equity, if the second Son should not alien by Fine and Recovery.

Mic. 17. Jac. B. R.

As to the second Objection, that the Cesser is on the Death of Tho. without issue in the Life of Henry, whereby the Contingency is reduced to happen in the Life of one person (viz.) Henry, and not at large (viz.) of the Death of Tho. without Issue, I conceive no difference made thereby, and it is in effect the point adjudged in Child and Bayly's Case which was thus: French a tenant for 76 years, demises to his Wife for Life, Remainder of the

Term to W. his Son and his Assigns, Provisoe, That if his Son W. dyed without Issue of his Body then living, that T. his Son should have the Term or Interest.

Adjudged then in B. R. which was three Years after affirmed in the Exchequer Chamber by Hobart, Winch, Denham, Hutton, and Jones, that the Demise to Tho. was void. Mic 20 Jac.

In that Case the Contingency did expect during the life of W. only as here it is on the life of H. and the Reasons of their Judgments both in the King's Bench and Exchequer Chamber, in effect of all the Judges of England at that time, was because it might tend to make a perpetuity, and that this new invented way of Intailing of Terms is in no sort to be favoured in Law,

In Child's Case 'twas limited, if William had no issue at the time of his decease; in this Case, if Tho. had no Issue at the time of Henry's Death.

Put case it had been limited, that Tho. had dyed without issue in thirty or forty, or any number of Years, or if it had been limited that Tho. had dyed without Issue in the Life of Henry, and five or six more persons, it might have been so limited as well as to one Life, and the Law is the same.

It is more Contingent when the Cessor is limited to be upon the death of Tho. without issue in the Life of Henry, than it had been if Tho. had dyed without issue generally; for he may dye without issue, though he dye not without Issue in the Life of Henry.

First, the sum of this is, if such limitation of a term as this is, be not good at Law, the trust of a term cannot be good in Chancery.

Secondly, the general scope of the Settlement of the term was, that the term should wait on the Inheritance in tail, which now cannot be because it is altered.

Again, if the Law should be otherwise, that Charles have the whole Term, then those in Remainder shall be utterly defeated of it, and shall not go to Charles his Son and Heir, but to the Executors, which never was intended by the Deed. M----d.

Opinions and Considerations for the younger Brothers. Sir J. C---.

I conceive, that notwithstanding the late Judgments in Chancery have been, that if a Term of years be limited by way of Trust, or otherwise, to any person and his Heirs Males, with Remainders over, or other limitations to any other persons, those Remainders and limitations are void, and the whole term shall be to that person and his Executors and Administrators, to whom it was first limited in tail; yet this Case is different from all those Cases, by reason this was only a Temporary Provision as to Mr. Henry Howard, until that Contingent of the death of the Duke of Norfolk should happen, and then absolutely to cease as to Mr. Henry Howard. And then the Trust of the term is declared to be for the preferment of the younger Sons, as is above expressed; and albeit that Marriot hath in plain breach of Trust by his Assignment, enabled the now Duke to destroy the term in point of Law, yet the Chancery may subject the Lands during the

the Remainder of the term to the Truſtees for the younger Children, as agreeable to the intention of the Deed of Truſt. and to all Honeſty and Equity, and that Equity I take it is in no ſort barr'd by the Fine, if a Bill be exhibited in time. *J. C.* 8. Jan. 1677.

Sir *R. S.* I concur with this Opinion, becauſe it is no abſolute Truſt, not ſo much as for the life of Henry, but a limited Truſt upon a Contingent, which as in its Creation it might, ſo in Fact, it did happen in the life-time of Henry; and conſequently there is no room for any Conſtruction to be made, that the Truſt of the whole term veſted in Henry againſt the expreſs limitation thereof. R. S.

Mr. *Offley.* I conceive, firſt, that if by Act executed my Lord of Arundel had created this term to my Lord Dorcheſter, and the reſt of the truſtees in truſt for Henry Howard in tail, and after his death to the Brothers in tail, that had been a perpetuity, and not good for a term; though as to that, there is a difference taken in Tatten and Mollenex Caſe, More 809, 810. in Chancery, by the Lord Chancellour, and the Judges aſſiſtant; which ſeems to be reaſonable, that the firſt party that is the Ceſtui que Truſt againſt his iſſue, may diſpoſe of it, but not againſt him in Remainder; for Equity preſerves it as to the Remainder, ſo then if it had been to Henry Howard and the Iſſues of his body, the Remainders to the Brothers: Though Henry Howard could, as to his Iſſue, diſpoſe of it, yet as to his Brothers it ſtood good, if that Reſolution holds good, and the Book ſays it was grounded upon precedents in that Court too. But this caſe differs where the courſe of Equity is againſt it; therefore, firſt there is only by this Conveyance a reception of the profits in Henry Howard and the Iſſue Male of his body, until the Dignity of Arundel come to him. And it is not in truſt for him and his Iſſue Male; ſo as he has not the entire truſt in him, as the other Sons have by the penning of the Deed. Secondly, 'tis not abſolutely in truſt in him and his Iſſue Male, but temporary in them, upon the falling of the Dignity of Arundel ſooner or later, And he is not a Ceſtui que Truſt within any of the Statutes preceding the Statute of Uſes, but has but a limited purſuance of the profits; but the truſt veſts compleatly in the Brothers after. Thirdly, then the Marquiſs of Dorcheſter aſſigns the term to Marriot, and he aſſigning to H. H. whereby he has in ſtrictneſs of Law extinguiſhed it, whereby there is a wrong and deceit done to the Brothers, he is bound in Equity and good Conſcience, to make them recompence and ſatisfaction for this wrong; and it appearing that H. H. was privy to this, with a deſign to extinguiſh it, and that extinguiſhment turning to his advantage, he is likewiſe compellable in Equity to anſwer it out of his Eſtate, either by creating a new Term in this Land, or by ſome other way, according to the Reſolution of the Judges in my Lord of Ormond's Caſe, Hubbard 350.

I have seen the Opinions of Mr. Attorney-General, Serj. Maynard, and Serj. Pemberton, whose Opinions I do much value, and have great esteem for. Mr. Attorney saith, that the Term to H. H. and the Heirs of his body, under other Limitations than the Inheritance was, the whole Term vested in H. H. and the Limitations thereof to the other Brothers are void, I conceive the whole trust of the Term is not limited to H. H. but part of the Trust, so long as Thomas the deceased Duke shall have Heirs Males of his body, and until the Earldom comes unto him; so as the Trust is but a qualified and limited Trust in H. H. so as this Trust to H. is now ended by way of Limitation to H. H. and then there is a new Trust springs and arises to the younger Brothers, not by way of Remainder of a term, but the Trust to H. H. being ended and determined, I conceive a new one may well arise and spring up to the younger Children, admitting it were a trust of a term in Gross it is not a Remainder, but a future Contingent grant and a limitation to them, as it is in Pell and Brown's Case. Sir W. Ellis.

A Trust ending by way of Limitation, and a new Trust springing.

Secondly, If it be to attend the Inheritance, then he conceives clearly, the Recovery having barred all Remainders, the Term and the Trust of the Term is also barred. If this Trust had been to wait upon all the Estate as they came in possession, it had been the stronger; but as this Case is, I conceive the Trust will wait upon the Estate of H. H. for so long as Tho. lives, and hath Heirs Males of his Body, and until the Earldom come unto him, and the Trust of Henry determines, and then a new Trust springs up to the younger Children, which is a future contingent Trust, so as a common Recovery can bar this Trust, so long only as they did wait upon the Estate of H. H. which is now determined by a collateral Limitation, and the Recovery cannot enlarge the Trust to H. H. and make that to continue which in its Creation was to end when such a Contingent happens, which hath now happen'd; if H. H. had not suffered a common Recovery, he had had an Estate-tail, yet no Trust, this is a future contingent Trust to the younger Children, which cannot be barred by a common Recovery.

W. Ellis, 8 Martii 1677.

1. The Surrender or Grant of the Lease for 200 years to Henry, nor the Extinguishment of the legal Interest of the Term, doth not prejudice the equitable Trust of the Term, so long as the Lands come not into other Hands (viz.) of a Purchaser, without notice of the Trust, which is not in this Case. Serj. M.. d for the Brothers.

2. An Intail cannot be made of a Term in Gross, as if a Lease for 1000 years be made in trust for J. S. and the Heirs of his Body, with Remainders over, J. S. may dispose of the whole Term, and such Disposal is good against his Issue and those in Remainder; and if he die without such Disposition made by him, his Executors shall have the Benefit of the Trust, and not his Issue or the Remainder. An Intail cannot be of a Term in gross, but may be disposed, and if not, shall go to Executors.

But a Term may be limited to attend the Inheritance in truſt, be it in fee or tail; and there the heir ſhall have the benefit.

3. But a Term may be limited to attend and wait on the Inheritance by way of a Truſt, as if a long Term of Years be, the Reverſion in Fee, if the Reverſion be purchaſed in Fee, or ſettled in Tail, the Term may be ſettled to the uſe of the Fee or Tenant in Tail; and in that caſe, if the Tenant in Tail die, or the Tenant in Fee die, the Heir or Iſſue ſhall have the Benefit of the Truſt, and not the Executors, &c.

Yet if Debts be, the Executors ſhall have it.

4. But in that Caſe, if the Tenant in Fee die in Debt, and no other ſufficient Aſſets to pay the Debt, in that Caſe the Executor ſhall be preferred before the Heir, although the Debt be ſuch as the Heir is not bound or liable unto.

Term, in Law, well alienated without Fine or Recovery.

5. And I conceive, that in that Caſe, if the Tenant in Tail, that hath the Equity of a Term waiting on it, do purchaſe the Term and alien, or obtain the Truſtee of the Term to make an Alienation of the Term, it ſhall bind the Iſſue in Tail and him in Remainder, though the Alienation be by Deed without Fine or Recovery, becauſe the Term in Law is well alienedwithout Fine, &c. And the Statute of Weſtm. 2d de bonis extends not to a Caſe of a Term.

6. Yet it is true this doth not abſolutely determine the Caſe in queſtion upon three Accounts.

Firſt, It is a new Caſe not yet brought in queſtion.

Secondly, Becauſe here is a ſpringing and a new Truſt by accident ſubſequent, and alters the Truſt, and changes the Intail of the Term to other Perſons, from Henry to the younger Children, and on ſuch Accident takes away the Truſt wholly from Henry the firſt Tenant in Tail.

And Thirdly, the Change ſeemeth to be grounded on great Reaſon; for the Lord Maltravers being in ſuch Condition as he was in, there was great Reaſon to diſable him and provide for the younger Children, as is done by this Caſe; and if Henry ſhould come to be Earl, and have Addition of Eſtates, that the other younger Children ſhould alſo have Acceſſion of Eſtate to them, and ſo it is by this Deed of Truſt provided.

But notwithſtanding theſe Reaſons, and this difference of the Caſe in theſe Circumſtances from other Caſes already reſolved, and the contrary Opinions that I have ſeen, I am rather of the Opinion, that in this Caſe the younger Brothers are bound by the Recovery ſuffered by Henry, than convinced that they are not bound; for I find that the Reaſons given e contra, touch not my Doubt fully.

The Reaſons of my Opinion are (viz.)

1. For the Recovery ſuffered, and the Time when it was ſuffered (to wit) before the Lord Maltravers died; for till he died, Henry was Tenant in Tail, and had Power by a Recovery to bar and diſpoſe of the whole Inheritance, as well of his own Eſtate Tail, as of thoſe in Remainder: The Term of Years was but acceſſary to ſerve and attend the Inheritance which was principal.

2. And the only Reaſon that made ſuch intailing or limitation of

the

the Term good, was, because it was to wait on the Inheritance, first to Henry in tail, and so successively to the other Brothers; or else, as it is abovesaid, the Limitation had not been good: And when that Reason fails, and the Cause why it was a good Limitation ceaseth and is taken away, the Effect of it doth likewise cease.

3. The change of the Term into thirds, doth not change the Estates tail of the younger Brothers, and cannot stand with the intention of the Deed of Trust: For I think it clear, if Charles, admitting he come to the Inheritance as Owner, or if in the Life of Henry he could get a Tenant of the Freehold of all, or any part of the Land to join with him, should then suffer a Recovery, it would bar Edward, Francis, and Bernard, of so much of the third part whereof such Recovery should be suffered, viz. of the whole Inheritance, and a third of the term and the residue (to wit) the other two parts would respectively cease, and be intailed as to the term, and be wholly in the respective Disposition of Edward and the rest, and go to their Executors, not to their Issues or the Remainders.

And yet upon long Consideration of the Case, there is another, and a further Ground of my Doubt of what hath been said (viz.) not only because it is a new Case, and concerneth a Great and Noble Family, but on another and further Ground observed and insisted upon by such great Opinions, contrary to what I have above observed (viz.) that it is not only a springing and contingent use to the younger Brothers, respecting them, but because the Original Trust to Henry, viz. that the Trust to him and his Issue is, as to him and them, under a Limitation; and that not so long as he the Tenant in tail shall have Issue, but so long as the Lord Maltravers shall have Issue Male, and on that reason the Case is more doubtful.

M---d.

Sir *W. Ellis.* A Term of 1000 years cannot be intailed nor a Remainder limited of it, but shall go to Executors.

1. I agree, that if a Man have a term for 1000 Years, and he grants and demiseth this to one and the Heirs Males of his Body, the Remainder to another and his Heirs, that this term cannot be intailed, nor a Remainder limited upon it; and that upon the Death of the Party to whom the term was so given, it shall go to his Executors as a Chattel, and not to his Heirs Male.

2. I do conceive it will not be denied by any, that if there be a long term for years, for 1000 years, more or less in trust, and a man purchases or settles the Inheritance to the use of himself for life, the Remainder in Tail, the Remainder in Fee, and declare that the trusts of the term shall wait upon those Estates, and fall in with them, but that this trust of the term shall go along with all the Estate, and shall not be merged in any of them, and this trust shall not go to an Executor, but shall go along with the Estate, and if the tenant in tail die without Issue, it shall go along with the next Remainder Man in tail, and after his Death without Issue, it shall go to him in Fee simple, and attend all the Estates in Remainders, be they never so many. And this, I conceive, is the common Course in Chancery to incorporate

Yet a trust of such a long Term may wait on, and go along with the Inheritance, &c.

such trusts to go with all the Estates. This is not an absolute Trust for Henry and the Heirs Male of his Body, but a limited and qualified Trust as long as Duke Thomas's elder Brother lived, and hath Heirs Males of his Body, and until the Earldom of A. doth come unto him; so as by the Death of Duke Thomas without Issue, the Trust to Henry, which was but a limited Trust, is now determined and vanquished as to Henry.

As this was a contingent trust in Henry, but in case Tho. was alive, and had Issue when the term was to begin, so the continuance and duration of the trust of the term, was but to last until the Earldom came unto him; and it is the stronger, for that this trust ends in Henry by way of Limitation.

Query. How long shall Henry and his Issue have this Trust?

Answer. Until Thomas die without Issue Male, and the Earldom of A. come unto him, both which hath happened, so as the trust for Henry and his Issue is ended by way of Limitation, and is now disposed over to others, as it may well be so, as this is a new Trust that by a contingent subsequent Declaration takes away the trust from Henry, and settles a new Trust in the younger Children; and it is to be considered, that Henry is to have the trust of this term, not so long as he shall have Issue, but so long as the Lord Maltravers shall have Heirs Male, so as that makes it a collateral Limitation or Determination of the said Estate.

4. The Equity and Justice of this Trust carries much weight with me, and that condition the Lord Maltravers was in: It was fit to settle the trust in Henry, so long as the Lord Maltravers had Heirs Male of his Body, and if they failed, and that the Earldom of A. and great accession of Estate to come to Henry, it was a great reason that the younger Children should be provided for and taken notice of.

And it will not be easie to blow off and overthrow a trust in a Court of Equity, contrary to the express mind and intention of him that made it, for the Provision of the younger Children, especially it being made with so much Justice and Reason, wherein he hath both a Respect for his Honour's Family and younger Children.

Obj. There is one Objection against all I have said, which seems prima facie to carry weight with it; and that is, when the legal Interest is come to Henry, and he is Tenant in tail in possession, and suffers a common Recovery, and bars all the Remainders in tail.

Query. How can this trust which is an Accessary follow Estates?

Answ. To which I answer first, If the Trust had been to follow and wait upon the Estate, this Objection had been the stronger; but this trust is not absolutely to wait upon Henry's Estate, but so long as Duke Thomas hath Heirs Male of his Body, and until the Earldom of A. come to him, both which are happened, he continues still Tenant in tail. and yet this Interest is determined in the trusts.

A future contingent Interest cannot be barr'd. Secondly, this is a future contingent Interest that now is happened to the younger Brothers, which cannot be barred, and it may be resembled to Pell and Brown's Case, 2 Cro. 590, 591.

A Man deviseth his Land to his second Son Thomas and his heirs, and if he die without Issue, leaving William his elder Brother, then William should have it in Fee; it was adjudged that this was a Fee Simple in Thomas the second. And though regularly one Fee cannot descend on another; yet this being a future contingent Interest that the Devise of the Fee Simple to William his eldest Son, was good.

Another great Question was, Thomas the second Son suffered a common Recovery, whether this did not bar the future contingent possibility of William?

And it was adjudged it did not.

Now here is as much a future contingent possibility of a Trust, as there was of an Estate and more, and therefore there is much reason that the future contingent possibility of a Trust should not be barred by a common Recovery, as in that Case. And as to that which is said, that an Accessary cannot be without a Substance, and the Estates of the younger Children is to succeed, and yet they have no proper Estate, for Henry is now Tenant, so as this is a personal trust for the younger Children independent of their Estates; and if so, then clearly this Recovery cannot bar their Estates.

Another reason why a Court of Equity should help and interpose in this Case, may be, because the Estate for Years was conveyed by Marriot in breach of the Trust, which a Court of Equity ought to maintain and support as much as they can.

Breach of Trust reliev'd in a Court of Equity,

First, Because Marriot and the now Duke are not Purchasers for a valuable Consideration.

Secondly, They came in with privity, and had notice of the Trust.

And I conceive may and will, notwithstanding these Acts, make good these Trusts for the younger Children; and if this be a new doubtful Case, certainly I conceive it is the surest and safest way for a Court of Equity to make good the intention of him that made it, and to preserve the Trust for the younger Children.

to make good the Intention of him that made it.

William Ellis, 26 Feb. 1677.

De Termino S. Hill. Anno Reg. Car. 2*d Regis* XXXIII & XXXIV *Anno Dom.* 1681. *Martis* 24 *die Jan. in Curia Cancellarii.*

Howard, *verſus le Duc de* Norfolk, *& al'*

This day being appointed for Judgment in this Cauſe, the three Judges aſſiſted the Lord Chancellor at the hearing, viz. the Lord Chief Juſtice Pemberton, the Lord Chief Juſtice North, and the Lord Chief Baron Montague, came into the Court of Chancery, and delivered their Opinions Seriatim, beginning with the Lord Chief Baron Montague, and ſo upwards; after whom the Lord Chancellor alſo delivered his Opinion: The Sum of all the Arguments, as near as could be taken, were as followeth.

The Argument of the Lord Chief Baron Montague.

Charles Howard is Plaintiff, and the Duke of Norfolk and others are Defendants. The Plaintiff by his Bill ſeeks to have Execution of a truſt of a term of 200 Years of the Barony of Groſtock, which was made by Henry Frederick Earl of Arundel, and upon the Bill, Anſwers, Deeds, and other Paſſages in this Cauſe contained, is this:

The Caſe. Henry Frederick Earl of Arundel by Leaſe and Releaſe of the 20th and 21ſt of March, 1647. did ſettle the Barony of Groſtock and of Burgh, and ſeveral other Lands to himſelf for Life, then to the Counteſs Elizabeth his Wife for Life, and then there is a term created for 99 years (which we need not mention in this Caſe, becauſe it is determined) and after the Death of the Counteſs, there is a term of years limited to my Lord of Dorcheſter and other Truſtees for 200 years, under a truſt to be declared in a Deed of the ſame date, with the Releaſe and the limitation of the Inheritance, after this term of 200 years, is firſt to Henry Howard now Duke of Norfolk and the Heirs Males of his Body, then to Mr. Charles Howard the now Plaintiff, Brother of the ſaid Henry, and ſo to all his Brothers ſucceſſively in tail Male, with the laſt Remainder to the Earl of and his Heirs, then by a Deed 21 of March 1647, the Earl declares the truſt of the term of 200 years, reciting firſt the uſes of the former Deed, and therein ſays, it was intended that the ſaid term ſhould attend the Inheritance, and the Profits of the Barony of ſhould be received for 200 years by Henry Howard now Duke of Norfolk and the Heirs Males of his Body, ſo long as Lord Thomas, eldeſt Son of the ſaid Earl of Arundel, or any Iſſue Male of his Body ſhould be living; but in caſe he ſhould

die without Iſſue Male in the Life of Henry Howard, not leaving his Wife enſient with a Son, or in caſe after the death of Thomas without Iſſue Male, the Honour of the Earldom of Arundel ſhould deſcend to Henry Howard, then he and his Iſſues to have no benefit of this term of 200 years, but it was to deſcend to the other Brother Charles Howard the now Plaintiff as hereafter is mentioned; and then comes Now this Indenture witneſſeth, and therein the Earl declares that it ſhould be under the Limitations after ſpecified (viz.) if Thomas Lord Howard had any Iſſue Male or heirs Male of his body (living Henry Howard) then the Truſtees ſhould have the commencement of the term in truſt for the ſaid Henry Howard, and the heirs Males of his body, till ſuch time as the Earldom ſhould come to Henry Howard, by the death of Thomas without heirs Males of his body, and after to the other Brothers ſucceſſively, and the heirs Males of their Bodies; and then doth divide the other Manors with croſs Remainders to the five Brothers, then the Caſe goes on thus; the Earl of Arundel dies in time in 1652, Elizabeth the Counteſs dies in 1673, then in 1675, my Lord of Dorcheſter, the ſurviving Truſtee, aſſigns the Term to one Marriot, he aſſigns it to the now Duke of Norfolk, and the Duke the 24th of Octob. 1675, by Bargain and Sale makes a Tenant to the Pretipe, and then a Recovery is ſuffered, and the Uſes of that Recovery 25th of October are declared to be to the Duke and his heirs. Then Tho. Howard the former Duke died without Iſſue, having never been married, and that is in the year 1677. whereby the Honour came to the now Duke, and ſo the Plaintiff's Bill is to have execution of the truſt of the term of the Barony of to the uſe of himſelf and the heirs Males of his body. This I conceive was oppoſed by the Counſel for the Defendant upon theſe Grounds:

1. That by the Aſſignment made by Marriot to my Lord Duke Henry, the term was ſurrendred and quite gone.

2. The ſecond ground was the common Recovery ſuffered, which they ſay barred the remainders which the other Brothers had, and ſo alſo would be a bar to the truſt of this term.

3. And the other ground was, that the truſt of a term to Henry and the heirs Males of his Body, until by the death of Thomas without Iſſue, the Earldom ſhould deſcend upon him, and then to Charles, is a void Limitation of the Remainder.

As to the firſt, that by the aſſignment of Marriot to Henry Howard, the whole term was ſurrendred; and being ſo ſurrendred, hath no exiſtence at all that I find, but was barely mentioned, and I think cannot be ſtood upon; for this the term by the ſurrender is gone indeed and merged in the Inheritance, yet the truſt of that term remains in Equity; and if this truſt be deſtroyed by him that had it aſſigned to him, this Court has full power to ſet it up again, and to decree the term to him to whom it did belong, or a recompence for it, therefore I think that ſtands not at all as a point in the Caſe, or as an objection in the way.

A Term may be ſurrender'd by Truſtees, and merged in the Inheritance, yet the Truſt remains in Equity, and the Chancery may ſet it up again.

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A Term attending the Inheritance barr'd by a Recovery,

As to the next thing, the common Recovery now suffered by the now Duke, that doth bar the remainders to the other Brothers; and so also the trust of this term: That I conceive to be so, in case this can be interpreted to be a term to attend the Inheritance; and indeed in the reciting part, the Deed doth seem to say, that it was intended to attend the Inheritance. But by that part of the Deed which followeth after (now this Indenture witnesseth) there it is limited, that the term should be to Henry Howard and the Heirs Males of his Body, until such time as the Honour of the Earl of Arundel by his elder Brothers death without Issue, should come to him; then to the Plaintiff, which doth convey the Estate of the term in a different Chanel, from that in which the Inheritance is settled; and taking this Deed altogether, it doth limit this term in such various Estates, that it can no way be construed to be a term attending the Inheritance; and then, I conceive, the recovery doth not bar the trust, for the recovery would bar the incident to any Estate, as this would do here, if it attended the Inheritance; but being only a term in Gross, and a collateral thing, I conceive the recovery has no operation to bar the trust in the term. Then the Case singly depends upon the third point, whether the Trust of a term thus limited to Henry Howard and the Heirs Males of his body until his Brother die without Issue, whereby the Honour came to him with such contingent Remainders over, be a good Limitation, this is the Question, and so in short the Case is thus: A Term of two Hundred years is granted in trust, that Henry Howard and the Heirs Males of his body shall receive the Profits until Thomas die without Issue Male of his body, and then to Charles Howard, and the Heirs Male of his body: And in this case, I am of Opinion, that these Limitations to the younger Brothers upon this Contingency, are absolutely void in the first Creation, and are gone without the Surrender; and that upon this Recovery Henry Howard, now Duke of Norfolk, ought to have the trust of the whole Term.

but not a term in gross, and a collateral thing.

The Expositions of Devizes of Terms, or the Dispositions of the trust of terms, have proceeded by many steps to higher degrees than was at first thought of by the makers. It would be too long to give a distinct History of it; but it is so plain, that it is now a resolved and decreed thing and settled, therefore it were in vain to tell you the Steps taken towards it. That the Devize of a term, and the limitation of the trust of a term to one and the Heirs of his body is good, though Burgesse's Case was only for Life, the Cases are very full in it. On the other side, where there is a Limitation of a Term to one and the Heirs of his body, there a positive Limitation of the Estate over, after his death without Issue, that I think also is as fully declared to be void. I shall not cite Cases at large, but only those Points and Expressions in them which are peculiar and pertinent to this purpose: there is Jinkins and Kennish's Case, I think it was in the Exchequer, there it was said, it was such a total Disposition of the term, to limit it to one and his Heirs Males, that it would

The Devise of a Term, and Limitation of the Trust of a Term to one and the heirs of his Body, good: but a Limitation over after his Death without Issue, void.

would not admit of a Limitation over, but adjudged to be void. So in my Lord Roll's Abridgments, 1 Part Tit. Devise fol. 611. 11 Car. 1. Leventhorp and Ashby's Case B.R. It is said, that the Remainder of a term to C. after it is limited to B. and the heirs Males of his Body, is a void Remainder; and fol. 613. he puts down the Reason why the Remainder is void, because the Limitation to one and the Heirs Males of his Body is a full Disposition of the Term. And if such Limitations over were permitted, it would create Perpetuities, which the Law doth abhor.

Limitations over would make a Perpetuity, which the Law abhors, and stands not with its Rules.

Sanders and Cornishe's Case, Croke fol. 230. There it is resolved, that the Devise of a Term in such a manner with Limitations after one another, to make a perpetuity, cannot be good: For, says the Book, to limit a possibility, and to limit the Remainder of a term, after a dying without Issue, stands not with the Rules of the Law. Now to bring this Case within these Rules, that if there be a Trust of a term to a Man and the Heirs of his body, no Limitation can be over: I say then, if this Estate be so limited to my Lord Duke by the name of Henry Howard, the other will follow when there is a Limitation in tail, (though it cannot be properly stiled in tail of a Term, yet it is a Disposition of that Term as long as the Tail lasts) then there can be no Limitation over. And as to that I think, as the Deed is penned, it may well be stood upon, that here is an Estate given to Henry and the Heirs Males of his body: For though the Deed says, until by the death of Thomas without Issue, the Earldom of Arundel shall descend upon him; yet the first Limitation, I think, shall stop at the Heirs Male of his Body, and the Remainder over shall be then void. But I will not stand upon that, because I think I shall not need it, but admit (until by the failure of the Issue of Thomas the Earldom come to him) makes it not an Estate to Henry and the heirs of his body directly, yet it gives an Estate to him and the heirs of his body, as long as Thomas has any Issue of his body, and that I count to be all one as to the Operation of Law; for each of the Estates must determine upon the Person's dying without Issue, which is too remote a Condition to limit the Remainders of a Term upon. And this until he die without Issue, and as long as he shall have Issue, are terms Synonimous in my Opinion; and so, it being a Limitation to him and his heirs of his Body. as long as Thomas liveth, and hath Issue of his body, it cannot be limited over, and the rather upon comparing the former part of the Deed, where there is an Expression, that it was intended the Estate should remain in my now Lord Duke, so long as Thomas lived, or had any Issue of his body. Therefore, I say, there being in my opinion no difference as to operation of Law, between the Limitations to a Man and the Heirs of his own body, and to a Man and the Heirs of his body during the life of another, and the heirs of his body, there can be no difference in the Resolution. It is as possible a disposition of the Term during the continuance of an Intail as the other, and therefore no Remainder can be limited over.

A Term tho' not properly intail'd, yet 'tis a Disposition of the Term as long as the Tail lasts.

A Limitation to a Man and the Heirs of his Body, and to a Man and the Heirs of his Body during the Life of another and the heirs of his Body, no difference.

But now the doubt in this Case, that is made, ariseth upon this Point, that this Limitation over to the Brothers, is upon a meer Contingency, and whether that be good, I think, is the main Question. And truly upon the reasons of Child and Baily's Case, I cannot think it is a good Limitation; that Case has been so often reported, that I need not put it at large. In short, this it was; A Devise by A. of a Term to William his eldest Son and his Assigns; and if he die without Issue, then to Thomas his youngest Son: there the Judges of the King's-Bench did first deliver their Opinion, that this was a void Limitation to Thomas. And after it came into the Exchequer-Chamber, and there, by the Opinion of ten Judges, it was affirmed, and the reasons of the Judgment are not what was alledged at the bar in this Cause; but they went upon the ground, because thereby a perpetuity would ensue; and that which was observed by one of the Councel, that the Term was given to him and his Assigns, was only an Answer to a Case put in the Argument upon Child and Baily's Case, which was the Case of Rhetorick and Chappell, Hill 9. Jac. R. 889. B. R. which was cited by my Lord Chief Baron Tanfield, against the resolution of Child and Baily's Case, to difference it from the Case then before them. And though it was urged in Child and Baily's Case, that it was given upon a Contingency to the younger Son, which would soon be determined, and end in a short time; yet that weighed not with the Judges, but that they ruled it to be a void Limitation; and I met lately with a Judgment in the Common-pleas, which crosseth the Case of Rhetorick and Chappell; it was Hill. 31. and 32 Car. 2. Reg. 1615. Gibson's and Sanders's Case; Matthews possessed of a long term of years, having Issue a Son and three Daughters, makes his Will, and devises his Chattel-Leases to his Son; and if that Son die before Marriage, or after Marriage without Issue, that then they should go to the Daughters. The Son doth marry, and dieth without Issue, the Daughters his Executrixes, against whom an Action of Debt is brought upon a Bond, they plead no Assets; and upon a special Verdict, the Question being whether this were Assets in their hands, it was adjudged it was.

Cro. Ja. 459.

Cro. Ja. 461.

A Term limited to Daughters upon the Sons dying without Issue, the Son dies without Issue, the Daughters his Executrixes, the Term Assets.

In the report of that Case, there are many expressions of the Courts unwillingness to extend these Devises and Dispositions of Terms, further than the Judges had gone already. The authority of this Case doth much strengthen the authority of Baily's Case, because it doth thwart and oppose the Judgment in Rhetorick and Chappell's Case.

There was also started at the Bar in Pell and Brown's Case, that a Fee upon a Fee, arising upon such a proximate Contingency, as might happen in so short a time as a Life, was a good Limitation. It is very true, that Case is so adjudged; but I think there might be such reason of difference urged between the Disposition of a Fee-Simple and of a Term; for a Fee may be qualified as to a Man and his heirs until a Marriage take effect; but the qualifying of a disposition of a Term cannot be, because when once a Term is given, the qualification comes too late.

I do think that there have been Cases in this Court, where a Term has been limited to one and the Heirs Males of his Body, upon a Contingency, to happen first with Limitations over, if that Contingency do not happen, that has been a good Limitation. As thus: If it be limited to the Wife for Life, and then to the eldest Son, if he over-live his Mother and the Heirs Males of his Body, the Remainder over to a younger Son, there if the eldest Son die in the Life of the Mother, the Limitation to the second Son may be good. But if there be an instant Estate-tail created upon a Term, with Remainders over, though there be a Contingency as to the Expectations of him in the Remainder, yet there is such a total Disposition of the Term, as after which no Limitations of a Term can be. For that Objection out of Pell and Brown's Case, there is no such sure Foundation to build upon in the Point of a Term, because that Case it self has been controverted since that Judgment given, in a Case between Jay and Jay, in Stiles's Reports, 258 and 274, Trinit. 1651, fol. 258. 'Tis thus: A Man seized in Fee devised it to one and his Heirs; and if he die during the Life of his Mother, the Remainder to another and his Heirs.

There is no Opinion given; but Rolls Chief Justice said, A Limitation of an Inheritance after an absolute Fee-simple, is not a good Limitation, because this would be to make a Perpetuity, which the Law will not admit; but if it be upon a contingent Fee-simple, it is otherwise: But fol. 274. where it is spoken to again by Latch, he argued, that it was not a good Limitation; and though he doth cite and confess Pell and Brown's Case to be adjudged quite contrary to what he argued, yet he tells you, that the Judges did find such Inconveniences arising upon it, that the Court was divided upon a like Case; and says further, that within nine years after that Judgment, 21 Jac. it was made a flat Query in the Serjeant's Case; and adds moreover, that it hath been ever since disputable, and cites a Case, and gives you a Roll, but not the Parties Names, Mich. 37 and 38 Eliz. C. B. Rol. 1149. wherein, says the Book, after solemn Arguments both at Bar and Bench, it was adjudged quite contrary to Pell and Brown's Case: But admit that Case to be good Law, where will you stop, if you admit the Limitation of a Term after an Estate-tail, where shall it end? For if after one, it may as well be after two; and if after two, then as well after twenty; for it may be said, if he die within 20 Years without Issue, and so if within 100; and there will be no end; and so a Perpetuity will follow. It was said at the Bar, it will be hard to frustrate the Intention of the Parties: To that I answer, Intentions of Parties not according to Law, are not to be regarded. It was the Intention in Child and Baily's Case, that the younger Son should have it, and so in Burgess's Case, it was the Intention the Daughter should have it; and so in Gibson's and Sommers's Case, it was intended for the Daughters; yet all these Intentions were crossed; and therefore as to that, it is not at all to weigh any thing in the Case.

Limitation of an Inheritance after an absolute Fee-simple, not good, *secus*, if upon a contingent Fee-simple.

Intention of Parties not according to Law, are not to be regarded.

It

It has also been objected, but then here is a contingency that has actually happen'd upon Thomas's death without Issue, and so the Honour is come to Henry, I say the happening of the Contingency is no ground to judge.

The Limitation good upon it, was not good if the other Limitation had stood out, and that I conceive is our Case. So then for that I think these Expositions have gone already as far as they can; for my part I cannot extend it any further, and therefore I conceive in this Case, the Plaintiff has no Right to this Term, but the Decree ought to be made for the Defendants.

The Argument of the Lord Chief Justice *North*.

I Shall not trouble your Lordship to repeat the Case again, for it has been truly opened by my Lord Chief Baron, nor shall I trouble you with any long Argument, because I think there is but one point in the Case, and that a short one: The only point is this, Whether this contingent Trust of a Term limited to Charles, upon the dying of Thomas without Issue Male, whereby the Honour did descend to Henry, be good in point of Creation and Limitation; for the other two points will not trouble the Case: For as to that point of the Recovery, in case this be not a good Limitation in point of Creation, it will make nothing in the Case, for it is gone without the Recovery. In case it be good in point of Creation, the Recovery will do nothing; for that supposeth it to go along with the Inheritance: And if this take effect, then it will suffer no prejudice by the Recovery. Then for the Assignment of Marriot to the Duke, that signifieth nothing in the Case; it doth indeed shew, that if your Lordship shall decree this Cause for the Plaintiff, then he hath committed a breach of Trust; but if for the Defendant, then it is of no weight at all. If the Law be for the Plaintiff, then he must answer for this breach of Trust, and so must the Duke; for it is a Surrender to a person that had notice of the Trust. So that the Question is barely upon that single first Point, whether it be a good Limitation upon the Contingency to Charles, this which they call a springing Trust.

The only Point.

My Lord, I take the Rules of this Court, in cases of Trusts of Terms, to be the same with Rules of Law in Devises of Terms: For I conceive the Rules of Law to prevent Perpetuities, are the polity of the Kingdom, and ought to take place in this Court, as well as any other Court. So I take it then, that the Trust of a Term is as much a Chattel, and under the consideration of this Court, as the Term it self; and therefore I cannot see, why the Trust of a Term upon a voluntary Settlement, should be carried further in a Court of Equity, than the Devise of a Term in the Courts of Common

The Rules of Law to prevent Perpetuities are the Polity of the Kingdom.

Common Law. It is true, where there is a long Term in being upon Mortgage, and as a security which is determined, it is of great convenience that it should be kept on foot to protect the Inheritance; and so it will lie still to wait upon the Inheritance, and thereupon in many Descents it will go from Heir to Heir, and that upon a particular consideration, to attend and protect the Inheritance: But for a meer Chattel to go from Heir to Heir, is not the same case; nor do I see any reason why this Court should carry such a Chattel any further, than Devises of Terms are carried at Common Law.

A long term upon a Mortgage fit to be kept a foot to protect the Inheritance, and wait upon it.

Now let us see, and a little consider, what those Rules are, and how they are appliable to this Case: In both cases a Term may be limited for life to one, with Remainders over, though in the bare consideration of Law, an Estate for life is a greater Estate than a term for years; but in case of an Estate-tail there can be no such thing; therefore in Burgess's Case, the Trust of a Term is limited to A. for Life, the Remainder to his Wife for life, the Remainder to the first, second, and other Sons successively, and the Issue of their bodies: and for default of such Issue, to the Daughters of A. and their Issue, the Remainder to the right Heirs of A. A. had no Son at that time living, nor after; but the Remainder over was to the Daughter of A. in being. It was strongly urged, that the Daughter should have the Trust vested in her, and that the Trust for the Daughter should close with the Estate for life till A. should have a Son. But because there was a Limitation to the first Son of A. and the Issue of his body, and the Remainder of the Daughter was but to take place, after that Son died without Issue, and so the others though it was not to a Son then in being. But his Estate was in contingencies which did never happen, yet the Court did not allow of any such thing, as any Remainder that the Daughter should have, but made a Decree for the Execution of the Devise; so that it is clear, there can be no direct Remainder of the Trust of a Term upon an Estate-tail.

Mod. Rep. 115.

The Question then is, whether there can be any contingent Remainder for this, for this Case depends upon that consideration; i.e. it is limited upon a Contingency, if such a thing should happen in the life of a Man, and so it is a springing Trust and good that way. My Lord, I take it in this case, where there can be no direct Remainder, there can be no contingent Remainder, though it happen never so soon: Therefore, if a Term be limited to one and his Heirs of his body, and he die without Issue of his body within two years, the Remainder over, there can be no such Remainder limited at all, and therefore no contingent Remainder; for this Remainder is limited at the end of an Intail, and that is so remote a consideration, that as the Law will not suffer a direct Remainder upon it, so upon a Contingency neither.

Where there can be no direct Remainder, there can be no contingent Remainper, Deny'd infra.

Now in this Case there is only this difference, if the Estate-tail in this Term had been limited to my Lord Maltravers, as 'tis here

to Henry Howard and the heirs of his body; and if he die without Issue in the life of Henry, &c. then the Remainder over, then it had been clear the Contingency had been limited upon the expiring of the Intail; and though it be said that it expires within the compass of the life of a Man, yet that helps not in this Case at all, as I conceive; for I will put a Case upon a Fee-simple (upon Pell and Brown's Case.) A Man limits an Estate in Fee-simple to a Man and his Heirs, and if he die without Heirs during the life of J. S. then to J. D. this is void, and the Lord shall have it by Escheat, and that (though it be brought within the compass of the life of a Man) shall never be a good Limitation: And if that Case of Pell and Brown had been, that a Man devised Land to a Man and his Heirs, whereby it would appear, that it was intended the Devisee should have had a Fee-simple, with a Remainder over upon a Contingency; I take it, this could not be good by way of executory Devise, because a Man's dying without Heirs, which to lose his Fee-simple he must do, comes not under the intention of the Law as of a Contingency. An Estate for life, in the judgment of the Law, is of longer duration than a Term for years; and the Rule in Child and Baily's Case is firm, that the expiring of the Limitation of a Term in Tail without the life of a Man, will not make good a Limitation of the Remainder over, which I hold to be a good Rule, and the reason of it, I conceive, will reach to this Case: For what is the difference? here is a Contingency indeed: but it is to have an Estate-tail expire within one Life, which I take to be the same case. Suppose the Term had been limited to Henry and the Heirs Males of his body, so long as Thomas shall have Heirs Male of his body, that would sure have cut off the Remainder; and what is the difference? For it doth depend upon Thomas dying without Issue, whereby the Earldom should descend, then when it is limited to Henry and the Heirs Males of his body. And if Thomas die without Issue in the life of Henry, then over, this can no more abridge it, than if he had said, if Henry die without Issue during the Life of another Man.

A Man's dying without Heirs, in the Intention of the Law, no Contingency An Estate for Life is of longer duration, in Judgment of Law, than a Term for years.

So that I think, the whole Term is swallowed in the Estate-tail upon this consideration, and there can be no Remainder of it, no executory Devise, nor any springing Trust to Charles upon this Contingency; and, my Lord, upon that Reason, I think this Settlement fails, and is disappointed as to the younger Brothers.

If it had been limited to Henry for Life only, and no further, then let the Contingency have been what it would, that were to happen in his Life, if complicated with several Ascendents, yet it should be good in Remainder, because the Law doth allow a Remainder directly upon an Estate for Life; and so it would also in Contingency if that were to happen during the continuance of the particular Estate: But I take this to be a step further than any of our Resolutions in Law have gone yet, and therefore I cannot see reason to extend the Exposition any further; but am of opinion it fails in point of Limitation, and ought to be decreed for the Defendant.

The Law allows a Remainder directly upon an Estate for Life, not so on a Contingency, unless it be to happen during the continuance of the particular Estate.

The

The Lord Chief Justice *Pemberton's* Opinion.

I Need not trouble your Lordship with opening the Case, the truth is, it is in short no more than thus: My Lord Duke of Norfolk's Father, the Earl of Arundel, having created an Estate for 200 years, and settled the Inheritance by one Deed in tail to himself for life; and after to his Lady for Life; and then to his Son, and the Heirs Males of his body; and for default of such Issue, to the other Son Charles, and the Heirs Males of his body, with several Remainders over. Then by another Deed, he does declare the Trusts of this term of 200 years, which being to Henry and the Heirs Males of his body, till my Lord Maltravers die without Issue Male, and the Earldom descend to my now Lord Duke; and after the determination of that Estate, if he shall die without Issue Male, then to come to Charles and the Heirs Males of his body, whether this be a good Remainder to Charles is the Question. For as to any thing of the Recovery or the Assignment, I shall put it quite out of the Case, and do not think it will have any Influence upon the Case as it lies before us. And indeed I do first think that the Earl of Arundel did certainly design, that if my Lord Maltravers should die without Issue Male, whereby the Honour of the Family should come to my Lord Duke that now is, Charles should have this Estate; and his intentions are manifest by creating this Term, which could be of no other use but to carry over this Estate to Charles a younger Son, upon the elder Son's dying without Issue. And I do think truly that this was but a reasonable Intention of the Father; for there being to come with the Earldom a great Estate that would so well support it, it was reason, and the younger Sons might expect it, that their Fortunes might be somewhat advanced by their Father in case it should so happen. It was a reasonable expectation in them; and truly I think it was the plain intention of the Earl. And there is no great question but it might have been made good and effectual by the limitation of two Terms; For if one Term had been limited to determine upon the death of Thomas without Issue, and that to be for the now Duke of Norfolk, and another Term then to commence and go over to Charles, that would certainly have been good, and carried the Estate to Charles upon that Contingency; but as this Case now is, I do think that this way that is now taken is not a good nor a right way; for I take this Limitation to Charles to be void in Law. And as to that, I know there is a famous difference of limiting Terms that are in Gross, and Terms that attend the Inheritance. As to Terms that are in Gross, I think it will be granted (because it hath been settled so often) they are not capable of limitation to one after the death of one without Issue; for so are all the Cases that have been cited. I think further, it is as clear, that upon Terms attendant upon an Inheritance, there may be such a Limitation, to wit, that

How this Case might have been made good.

Terms in Gross cannot be limited in Remainder. *Secus*, Terms that attend an Inheritance.

a Term that waits upon an Inheritance after the death of one without Issue, may go over to another: But then it is capable of such a Limitation in that Case, with this Restriction; that is, if the Inheritance be so limited; for though it be attendant ever so much upon the Inheritance, yet that attendance cannot make it capable of another Limitation than that Inheritance is capable of: For if I have an Estate in Fee-simple, and have the Trust of a Term attendant upon that, and I will let the Estate of Inheritance descend to my Son, I cannot in this Case (though the Term be attendant) limit it, that if my Son die without Issue, that Term shall go over; it is not capable of any Foreign Limitation whatsoever; for as to that, it is a Term in Gross, it hath not the quality of a Term attendant upon the Inheritance at all; for first, it would fail of an Inheritance, and a Free-hold to support it, and further than a Term can be supported with a like Estate of Inheritance; it will fail to be a Term attendant upon the Inheritance. Now here the Estate of Inheritance is limited to Henry and the Heirs Males of his Body, with Remainders to Charles and the Heirs Males of his Body. Now thus the Term is capable of a Limitation to Henry and the Heirs Males of his Body: And for want of such Issue, to Charles and the Heirs Males of his Body; because it hath an Inheritance, on which it depends, to go along with it and support it. But to take this out of its right Course and Chanel, and put another Limitation upon it: That upon the dying of Thomas without Issue, whereby the Earldom shall descend, this shall go over to Charles; alas it cannot be, because it hath no Free-hold or Inheritance to support it.

The Diversity as to this Case.

And then besides, it could not have that Reason that the Law intends for its permitting such Limitations to Terms attending the Inheritance; for I take it, the Reason why Terms are admitted to be attendant upon the Inheritance, and to be capable of Limitations to go along with the Inheritance, is the relation they have to the Inheritance; and because it is for the Benefit of the Inheritance, and that I conceive was the only Reason that at first guided these Judgments of the Court of Chancery, that these Terms should be admitted to wait upon the Inheritance to protect it; when Mortgages were made in former Times by Feoffments, upon condition of payment of Money, we hear of none of these Terms. But in the latter part of Queen Elizabeth's time, and since, the way of limiting Terms in Mortgages came up in use, and then upon the buying of Inheritances came in the Trust of these Terms; and they that purchased were advised to keep those Terms on foot, to protect their purchased Inheritance.

I must look upon this indeed as a new Case of Novel Invention; for in truth I think it is Primæ Impressionis, and none of the former Cases have been exactly the same: For this Term here does partake somewhat of a Term in Gross, and somewhat of a Term attendant upon an Inheritance; and if there should be such a Limitation admitted, such a Foreign Limitation as this is, (I call it Foreign, because it

it is not that which goes along with the Inheritance.) If that be allowed, we know not what Inventions may grow upon this; for I know Mens Brains are fruitful in Inventions, as we may see in Matthew Manning's Case. It was not foreseen nor thought, when that Judgment was given, what would be the Consequence when there was an Allowance of the Limitation of a Term after the death of a Person, presently it was discerned, there was the same Reason for after twenty Mens Lives as after one; and so then it was held and agreed, that so long as the Limitation exceeded not Lives in being at the creation of the Estate, it should extend so far. That came to grow upon them then; and now if this be admitted, no Man can foresee what an ill Effect such an ill Allowance might have there, might such Limitations come in as would incumber Estates and mightily entangle Lands.

This is certain, such an allowed Limitation would add a greater Check to Estates than was ever made by Limitations of Inheritance: For when an Estate of Inheritance was limited to a Man and his Heirs Males of his Body, with Remainders over, and a Term was limited accordingly to wait upon the Inheritance: In that Case, he that had the first Estate-tail, had full power over the Term, to alienate it if he pleased; for it is not an Estate within the Statute De Donis; and I doubt not that had a great Influence upon the Judges, when they made the difference between Terms for Years in Gross, and Terms attendant upon the Inheritance. For Terms in Gross, they could not be alienated in such a Case; but Terms attending upon the Inheritance, though under such Limitations, the Parties could alien them.

But now if this Limitation in question were good, then Henry could not part with it, because it is to him and his Heirs Males of his Body, under a collateral Limitation of his Brother's dying without Issue, and the Earldom descending to himself, and then his Estate was to determine, and so it would fetter that which if it had been a Term attendant, &c. would have been alienable.

I have seen the time often when they have refused to carry Cases further than the Precedents have been in former times; and peradventure it would be dangerous if we should do so here; and it seems to me to be an odd kind of Estate, as this Limitation makes it; and if such a Construction, as the Plaintiff would have, should be made, it would bring it under a great uncertainty. To take this Estate as it stands in Henry and the Heirs Males of his Body, it is by this Limitation made, and so indeed I think it is, a Term that waits upon the Inheritance: But if this that is contended for be admitted to be a good Limitation upon the Contingency of Thomas's dying without Issue Male, then the Estate in Charles would be a Term in gross, for it hath no Inheritance to attend upon. Then suppose Henry had died without Issue Male in Charles's Life time, then it is a Term attendant upon the Inheritance again. If Charles die in the Life of Henry, it goeth to the Executors. If Henry in the Life of Charles, it goes to the Heirs.

Therefore I think that this Eſtate being limited in another way, and being it would endure a ſtrain further than any yet has been attempted, and it being to commence upon Thomas's dying without Iſſue Male, and not attendant upon any Inheritance, it is ſuch an Eſtate as the Law cannot allow of, but void in Limitation and Creation; and ſo I take it the Plaintiff's Bill ought to be diſmiſſed.

THE

Lord Chancellor *NOTTINGHAM's* ARGUMENTS.

The Firſt Argument.

This is the Caſe. The Plaintiff, by his Bill, demands the Benefit of a Term for Two hundred Years, in the Barony of Groſtock, upon theſe Settlements.

Henry Frederick, late Earl of Arundel and Surrey, Father of the Plaintiff and Defendant, had Iſſue, Thomas, Henry, Charles, Edward, Francis and Bernard; and a Daughter, the Lady Katharine: Thomas Lord Maltravers, his eldeſt Son, was Non compos Mentis, and care is taken to ſettle the Eſtate and Family, as well as the preſent Circumſtances will admit. And thereupon there are two Indentures drawn, and they are both of the ſame Date. The one is an Indenture between the Earl of Arundel of the one part; and the Duke of Richmond, the Marquels of Dorcheſter, Edward Lord Howard of Eaſtcricke, and Sir Thomas Hatton of the other part: It bears Date the Twenty firſt Day of March, 1647. Whereby an Eſtate is conveyed to them and their Heirs; To theſe Uſes: To the uſe of the Earl for his Life.

After that to the Countels his Wife for her Life, with power to make a Leaſe for 21 Years, reſerving the ancient Rents.

The Remainder for 200 Years to thoſe Truſtees, and that upon ſuch Truſts, as by another Indenture, intended to bear date the ſame Day, the Earl ſhould limit and declare; and then the Remainder of the Lands are to the uſe of Henry, and the Heirs Males of his Body begotten, with like Remainders in Tail to Charles, Edward, and the other Brothers ſucceſſively.

Then

Then comes the other Indenture, which was to declare the Truſt of the Term for 200 Years, for which all theſe Preparations are made, and that declares that it was intended this Term ſhould attend the Inheritance, and that the Profits of the ſaid Barony, &c. ſhould be received by the ſaid Henry Howard, and the Heirs Males of his Body, ſo long as Thomas had any Iſſue Male of his Body ſhould live, (which was conſequently only during his own Life, becauſe he was never likely to marry) and if he die without Iſſue in the Life-time of Henry, not leaving a Wife privement Enſeint of a Son, or if after his Death, the Dignity of Earl of Arundel ſhould deſcend upon Henry; Then Henry or his Iſſue ſhould have no farther Benefit or Profit of the Term of 200 Years. Who then ſhall? But the Benefit ſhall redound to the younger Brothers in manner following. How is that? To Charles and the Heirs Males of his Body, with the like Remainders in Tail to the reſt. Thus is the matter ſettled by theſe Indentures; how this Family was to be provided for, and the whole Eſtate govern'd for the time to come.

Theſe Indentures are both ſealed and delivered in the preſence of Sir Orlando Bridgman, Mr. Edward Alehorn, and Mr. John Alehorn, both of them my Lord Keeper Bridgman's Clerks; I knew them to be ſo.

This Atteſtation of theſe Deeds is a Demonſtration to me they were drawn by Sir Orlando Bridgman.

After this the Contingency does happen: For Thomas Duke of Norfolk dies without Iſſue, and the Earldom of Arundel as well as the Dukedom of Norfolk deſcended to Henry now Duke of Norfolk, by Thomas his death without Iſſue: Preſently upon this the Marqueſs of Dorcheſter, the ſurviving Truſtee of this Eſtate, aſſigns his Eſtate to Marriot; but he doth it upon the ſame Truſts that he had it himſelf: Mr. Marriot aſſigns his Intereſt frankly to my Lord Henry, the now Duke, and ſo has done what he can to merge and extinguiſh the Term by the aſſigning it to him, who has the Inheritance.

To excuſe the Marqueſs of Dorcheſter from co-operating in this matter, it is ſaid, there was an abſolute neceſſity ſo to do; Becauſe the Tenants in the North would not be brought to renew their Eſtates, while ſo aged a Perſon did continue in the Seigniory, for fear, if he ſhould die quickly, they ſhould be compelled to pay a new Fine. But nothing in the World can excuſe Marriot from being guilty of a moſt wilful and palpable Breach of Truſt, if Charles have any Right to this Term: So that the whole Contention in the Caſe is, to make the Eſtate limited to Charles void; void in the Original Creation; if not ſo, void by the common Recovery ſuffered by the now Duke, and the Aſſignment of Marriot. If the Eſtate be originally void, which is limited to Charles, there is no harm done; but if it only be avoided by the Aſſignment of Marriot, with the concurrence of the Duke of Norfolk, he having notice of the Truſts, then moſt certainly they muſt make it good to Charles in Equity, for a palpable Breach of Truſt, of which they had notice.

The main Point.

So that the Question is reduced to this main single Point, Whether all this Care that was taken to settle this Estate and Family, be void and insignificant; and all this Provision made for Charles and the younger Children to have no Effect?

I am in a very great strait in this Case: I am assisted by as good Advice, as I know how to repose my self upon, and I have the fairest Opportunity, if I concur with them, and so should mistake, to excuse my self, that I did errare cum patribus; but I dare not at any time deliver any Opinion in this place, without I concur with my self and my Conscience too.

I desire to be heard in this Case with great Benignity, and with great Excuse for what I say, for I take this Question to be of so universal a concernment to all Mens Rights and Properties, in point of disposing of their Estates, as to most Conveyances, made and settled in the late times and yet on foot, that being afraid I might shake more Settlements than I am willing to do, I am not disposed to keep so closely and strictly to the Rules of Law as the Judges of the Common-Law do, as not to look to the Reasons and Consequences that may follow upon the Determination of this Case.

I cannot say in this Case, that this Limitation is void, and because this is a point, that in Courts of Equity (which are not favoured by the Judgments of the Courts of Law) is seldom debated with any great Industry at the Bar; but where they are possessed once of the Cause, they press for a Decree, according to the usual and known Rules of Law; and think we are not to examine things. And because it is probable this Cause, be it adjudged one way or other, may come into the Parliament, I will take a little pains to open the Case, the Consequences that depend upon it, and the Reasons that lie upon me, as thus perswaded, to suspend my Opinion.

Things to be granted in this Case.

Whether this Limitation to Charles be void or no, is the Question. Now, first, these things are plain and clear, and by taking notice of what is plain and clear, we shall come to see what is doubtful.

1. That the Term in question, tho' it were attendant upon the Inheritance, at first, yet upon the happening of the Contingency, it is become a Term in gross to Charles.

2. That the Trust of a Term in gross can be limited no otherwise in Equity, than the Estate of a Term in gross can be limited in Law: For I am not setting up a Rule of Property in Chancery, other than that which is the Rule of Property at Law.

3. It is clear, That the legal Estate of a Term for Years, whether it be a long or a short Term, cannot be limited to any Man in Tail, with the Remainder over to another after his Death without Issue; That is flat and plain, for that is a direct Perpetuity.

4. If a Term be limited to a Man and his Issue, and if that Issue die without Issue, the Remainder over, the Issue of that Issue takes no Estate; and yet because the Remainder over cannot take place,

till the Iſſue of that Iſſue fail, that Remainder is void too, which was Reeve's Caſe; and the reaſon is, becauſe that looks towards a perpetuity.

5. If a Term be limited to a man for life, and after to his firſt, ſecond, third, &c. and other Sons in Tail ſucceſſively, and for default of ſuch Iſſue the Remainder over, tho' the contingency never happen, yet that Remainder is void, tho' there were never a Son then born to him; for that looks like a perpetuity, and this was Sir William Backhurſt his Caſe in the 16. of this King. Modern Reports, 115.

6. Yet one ſtep further than this, and that is Burgis's Caſe. A Term is limited to one for life, with contingent Remainders to his Sons in Tail, with Remainder over to his Daughter, tho' he had no Son; yet becauſe it is foreign and diſtant to expect a Remainder after the Death of a Son to be born without Iſſue, that having a proſpect of a perpetuity, alſo was adjudged to be void. Modern Reports, 115.

Theſe things having been ſettled, and by theſe Rules has this Court always governed it ſelf: But one ſtep more there is in this Caſe.

7. If a Term be deviſed, or the Truſt of a Term limited to one for Life, with twenty Remainders for Life, ſucceſſively, and all the perſons in eſſe, and alive at the time of the Limitation of their Eſtates, theſe tho' they look like a poſſibility upon a poſſibility, are all good, becauſe they produce no inconvenience, they wear out in a little time with an eaſie interpretation, and ſo was Alford's Caſe. I will yet go farther.

8. In the Caſe cited by Mr. Holt, Cotton and Heath's Caſe, a Term is deviſed to one for 18 Years, after to C. his eldeſt Son for Life, and then to the eldeſt Iſſue Male of C. for Life, tho' C. had not any Iſſue Male at the time of the Deviſe, or death of the Deviſor, but before the death of C. it was reſolved by Mr. Juſtice Jones, Mr. Juſtice Crook, and Mr. Juſtice Berkley, to whom it was referred by the Lord Keeper Coventry, that it only being a contingency upon a Life that would ſpeedily be worn out, it was very good; for that there may be a poſſibility upon a poſſibility, and that there may be a contingency upon a contingency, is neither unnatural nor abſurd in it ſelf; but the contrary Rule given as a Reaſon by my Lord Popham in the Rector of Chedington's Caſe, looks like a Reaſon of Art; but in truth, has no kind of Reaſon in it, and I have known that Rule often denied in Weſtminſter Hall. In truth, every Executory Deviſe is ſo, and you will find that Rule not to be allowed in Blanford and Blanford's Caſe, 13 Jac. 1. part of my Lord Rolls, 318. where he ſays, if that Rule take place, it will ſhake ſeveral common Aſſurances: And he cites Paramour's and Yardley's Caſe in the Commentaries where it was adjudged a good Deviſe, though it were a poſſibility upon a poſſibility. Roll. abr. tit. deviſe, 612.

A Poſſibility upon a Poſſibility, and Contingency upon a Contingency, may be. Co. 1. 156.

These Conclusions, which I have thus laid down, are but Preliminaries to the main Debate. It is now fit we should come to speak to the main Question of the Case, as it stands upon its own Reason, distinguished from the Reasons of these Preliminaries; and so the Case is this.

The direct Question.

The Trust of a Term for Two Hundred years is limited to Henry in Tail, provided if Thomas die without Issue in the life of Henry, so that the Earldom shall descend upon Henry, then to go to Charles in Tail; and whether this be a good Limitation to Charles in Tail, is the Question; for most certainly it is a void Limitation to Edward in Tail, and a void Limitation to the other Brothers in Tail: But whether it be good to Charles is the doubt, who is the first taker of this Term in gross; for so it is (I take it) now become, and I do, under favour, differ from my Lord Chief Justice in that point; for, if Charles die, it will not return to Henry; for

Co. 10. 87. that is my Lord Coke's error in Leonard Loveis's Case: for he says, That if a Term be devised to one and the Heirs Males of his body, it shall go to him or his Executors, no longer than he has Heirs Males of his body; but it was resolved otherwise in Leventhorp's and Ashby's Case, 11. Car. B. R. Rolls's Abridgment, Title Devise, fol. 611. for these Words are not the Limitation of the time, but an absolute disposition of the Term.

But now let us, I say, consider whether this Limitation be good to Charles or no. It hath been said,

Object. 1. It is not good by any means; for it is a possibility upon a possibility.

Answ. That is a weak Reason, and there is nothing of Argument in it, for there never was yet any Devise of a Term with Remainder over, but did amount to a possibility upon a possibility, and executory Remainders will make it so.

Obj. 2. Another thing was said, it is void, because it doth not

Co. 6. Rep. 40 determine the whole Estate, and so they compare it to Sir Anthony Mildmay's Case, where it is laid down as a Rule, that every Limitation or Condition ought to defeat the entire Estate, and not to defeat part and leave part not defeated; and it cannot make an Estate to cease as to one person, and not as to the other. But,

Answ. I do not think, that any Case or Rule was ever worse applied than that to this; for if you do observe this Case, here is no Proviso at all annexed to the legal Estate of the Term, but to the equitable Estate, that is built upon the legal Estate, unto the Estate to Henry, and the Heirs Males of his body, to attend the inheritance with a Proviso if Thomas die without issue in Henry's life, and the Earldom come to Henry, then to Charles: which doth determine the Estate to Henry, and his issue; but the other Estate given to Charles doth arise upon this Proviso, which makes it an absurdity to say, that the same Proviso, upon which the Estate ariseth, should determine that Estate too.

Obj.

Obj. 3. The great matter objected is, it is against all the Rules of Law, and tends to a perpetuity.

Answ. If it tends to a perpetuity, there needs no more to be said, for the Law has so long laboured against perpetuities, that it is an undeniable Reason against any settlement, if it can be found to tend to a perpetuity.

Therefore let us examine whether it do so, and let us see what a Perpetuity is, and whether any Rule of Law is broken in this Case.

A Perpetuity is the settlement of an Estate or an Interest in Tail, with such Remainders Expectant upon it, as are in no sort in the power of the Tenant in Tail in possession, to dock by any Recovery or Assignment, but such Remainders must continue as perpetual clogs upon the Estate: such do fight against God, for they pretend to such a stability in human Affairs, as the nature of them admits not of, and they are against the Reason and the Policy of the Law, and therefore not to be endured.

A Perpetuity, what.

Why not to be endured.

But on the other side, future interests, springing Trusts, or Trusts Executory, Remainders that are to emerge and arise upon Contingencies, are quite out of the Rules and Reasons of Perpetuities, nay, out of the reason upon which the Policy of the Law is founded in those Cases, especially, if they be not of remote or long consideration; but such as by a natural and easie interpretation will speedily wear out, and so things come to their right Chanel again.

Remainders that arise upon Contingencies out of the Rules of Perpetuities.

Let us examine this Rule with respect to Freehold-Estates, and see whether there it will amount to the same Issue.

There is not in the Law a clearer Rule than this, that there can be no Remainders limited after a Fee-simple, so is the express Book-Case, 29 Hen. 8. 33. in my Lord Dyer; but yet the nature of things, and the necessity of commerce between Man and Man, have found a way to pass by that Rule, and that is thus; either by way of Use, or by way of Devise: Therefore if a Devise be to a Man and his Heirs, and if he die without Issue in the life of B. then to B. and his Heirs: this is a Fee-simple upon a Fee-simple, and yet it has been held to be Good.

No Remainder can be limited after a Fee-simple yet by way of Use, or by way of Devise it hath been done.

My Lord Chief Baron did seem to think, that this Resolution did take its Original from Pell's and Brown's Case; but it did not so, the Law was settled before; you may find it expressly resolved 19 Eliz. in a Case between Hynde and Lyon, 3. Leonard. Which, of the Books that have lately come out, is one of the best; and it was there adjudged to be so good a limitation, that the Heir who pleaded riens peer descent was forced to pay the Debt, and it had the concurrence of a judgment in 38 Eliz. grounded upon the Reason of Wellock and Hammond's Case, cited in Beraston's Case, where it is said, Crook, Eliz. 204. in a devise it may well be, that an Estate in Fee shall cease in one, and be transferred to another: all this was before Pell's and Brown's Case, which was in 18 Jac. It is true, it was made a Question afterwards in the Serjeants Case;

Cro. Mich. 18 Jac. 590.

3 Leonard. 64.

but what then? We all know that to be no Rule to judge by; for what is used to exercise the Wits of the Serjeants, is not a governing Opinion to decide the Law. It was also adjudged in Hil. 1649. when my Lord Rolls was Chief Justice, and again in Mich. 1650. and after that indeed in 1651, it was resolved otherwise in Jay and Jay's Case, but it has been often agreed that where it is within the compass of one Life, that the Contingency is to happen, there is no danger of a perpetuity. And I oppose it to that Rule which was taken by one of the Lords the Judges, that where no Remainders can be limited, no contingent Remainders can be limited, which I utterly deny, for there can be no Remainder limited after a Fee-simple, yet there may a contingent Fee-simple arise out of the first Fee, as hath been shewn.

No Remainder can be limited after a Fee-simple, yet a Contingent Fee-simple may rise out of the first Fee.

Thus it is agreed to be by all sides in the Case of an Inheritance; but now say they, a Lease for Years, which is a Chattel, will not bear a contingent Limitation in regard of the poverty and meanness of a Chattel-Estate. Now as to this point, the difference between a Chattel and an Inheritance is a difference only in Words, but not in substance, nor in Reason, or the Nature of the thing: for the owner of a Lease has as absolute a power over his Lease, as he that hath an Inheritance has over that. And therefore where no perpetuity is introduced, nor any inconveniency doth appear, there no Rule of Law is broken.

Reasons that support the springing Trust of a Term, as well as the springing use of an Inheritance

The Reasons that do support the springing Trust of a Term as well as the springing use of an Inheritance, are these.

1. Because it hath hapned sometimes, and doth frequently, that Men have no Estates at all, but what consist in Leases for Years: Now it were not only very severe, but (under favour) very absurd, to say that he who has no other Estate but what consists in Leases for Years, shall be incapable to provide for the Contingencies of his own Family, tho' these are directly within his view and immediate prospect. And yet if that be the Rule, so it must be; for I will put the Case; A Man that hath no other Estate but Leases for Years, Chattels real, treats for the Marriage of his Son and thereupon it comes to this agreement: These Leases shall be settled as a Joynture for the Wife, and provision for the Children: says he, I am content, but how shall it be done? Why thus; You shall assign all these Terms to John a Styles, in Trust for your self and your Executors, if the marriage take no effect; But then, if it takes effect, to your Son while he lives, to his Wife after while she lives, with Remainders over. I would have any one tell me whether this were a void limitation upon a Marriage-settlement; or if it be, what a strange absurdity is it, that a Man shall settle it if the Marriage take no effect, and shall not settle it if the Marriage happen.

Leases settled on Marriage.

2. Suppose the Estate had been limited to Henry Howard and the Heirs Males of his body, till the death of Thomas without Issue, then to Charles, there it had been a void limitation to Charles: if then the addition of those words, If Thomas dye without Issue in the life of Henry, &c. have not mended the matter, then all that addition

of Words goes for nothing, which it is unreasonable and absurd to think it should.

3. Another thing there is, which I take to be unanswerable, and gather it from what fell from my Lord Chief Justice Pemberton; and when I can answer that case, I shall be able to answer my self very much for that which I am doing. Suppose the Proviso had been thus penned, And if Thomas die without Issue Male, living Henry, so that the Earldom of Arundel descend upon Henry, then the Term of 200 Years limited to him and his Issue, shall utterly cease and determine, but then a new Term of 200 Years shall arise and be limited to the same Trustees, for the Benefit of Charles in Tail. This he thinks might have been well enough, and attained the End and Intention of the Family, because then this would not be a Remainder in Tail upon a Tail, but a new Term created.

Pray let us so resolve Cases here, that they may stand with the Reason of Mankind, when they are debated abroad. Shall that be Reason here that is not Reason in any part of the World besides? I would fain know the difference, why I may not raise a new springing Trust upon the same Term, as well as a new springing Term upon the same Trust; that is such a chicanery of Law as will be laught at all over the Christian World.

True Reason the same all over the World.

Chicaneries of Law, ridiculous.

4. Another Reason I go on is this; That the Meanness of the Consideration of a Term for Years, and of a Chattel-Interest, is not to be regarded: For whereas this will be no Reason any where else; so I shall shew you, that this Reason, as to the Remainder of a Chattel-Interest, is a Reason that has been exploded out of Westminster-Hall. There was a time indeed that this Reason did so far prevail, that all the Judges in the time of my Lord Chancellor Rich, did 6 Edvardi 6. deliver their Opinions, That if a Term for Years be devised to one, provided that if the Devisee die, living J. S. then to go to J. S. that Remainder to J. S. is absolutely void, because such a Chattel-Interest of a Term for Years is less than a Term for Life, and the Law will endure no Limitation over. Now this being a Reason against Sense and Nature, the World was not long govern'd by it, but in 10 Eliz. in Dyer, they began to hold the Remainder was good by Devise; and so 15 Eliz. seems too, and 19 Eliz. it was by the Judges held to be good Remainder; and that was the first time that an executory Remainder of a Term was held to be good. When the Chancery did begin to see that the Judges of the Law did govern themselves by the Reason of the Thing, this Court followed their Opinion, the better to fix them in it, they allowed of Bills by the remainder-Man, to compel the Devisee of the particular Estate, to put in Security that he in Remainder should enjoy it according to the Limitation. And for a great while so the Practise stood, as they thought it might well, because of the Resolution of the Judges, as we have shewn; but after this was seen to multiply the Chancery Suits, then they began to resolve that there was no need of

Remainder of a Chattel-Interest, how it grew up and increas'd in time.

Dyer, *fol.* 74.

Dyer, *f.* 277.

Dyer, *f.* 328.
Dyer, *f.* 358.

that way, but the executory Remainder Man should enjoy it, and the Devisee of the particular Estate should have no power to bar it. Men began to presume upon the Judges then, and thought if it were good as to remainders after Estates for Lives, it would be good also as to remainders upon Estates-Tail: That the Judges would not endure, and that is so fixed a resolution, that no Court of Law or Equity ever attempted to weak in the World. Now then come we to this Case, and if so be where it does not tend to a Perpetuity, a Chattel-Interest will bear a remainder over, upon the same reason it will bear a remainder over upon a Contingency, where that Contingency doth wear out within the compass of a Life, otherwise, it is only to say, it shall not, because it shall not: For there is no more Inconveniences in the one than in the other.

Come we then, at last, to that which seems most to choak the Plaintiff's Title to this Term, and that is the Resolution in Child and Bayly's Case: For it is upon that Judgment, it seems, all Conveyances must stand or be shaken, and our Decrees made. Now therefore I will take the liberty to see what that Case is, and how the Opinion of it ought to prevail in our Case.

1. If Child and Bayly's Case be no more than as it is reported by Rolls, part 2d. fol 119. then it is nothing to the purpose: A Devise of a Term to Dorothy for Life, the Remainder to William, and if he dies without Issue, to Thomas, without saying, in the Life of Thomas; and so it is within the common Rule of a Limitation of a Term in Tail, with Remainder over, which cannot be good.

But if it be as Justice Jones has reported it, fol. 15. then it is as far as it can go, an Authority: For it is there said to be, living Thomas. But the Case, under favour, is not altogether as Mr. Justice Jones hath reported it neither; for I have seen a Copy of the Record upon this account; and, by the way, no Book of Law is so ill corrected, or so ill printed as that.

The true Case is, as it is reported by Mr. Justice Crook; and with Mr. Justice Crook's Report of it, doth my Lord Rolls agree, in his Abridgment, Title Devise, 612. There it is, a Term of 76 Years is devised to Dorothy for Life, than to William and his Assigns all the rest of the Term, provided if William die without Issue then living, then to Thomas; and this is in effect our present Case; I agree it. But that which I have to say to this Case is,

Cro. Hil. 15. Jac. 459.

First, It must be observed, that the Resolution there, did go upon several Reasons, which are not to be found in this Case.

1. One Reason was touched upon by my Lord Cheif Baron, That William having the Term to him and his Assigns, there could be no Remainder over to Thomas, of which Words there is no notice taken by Mr. Justice Jones.

2. Dorothy the Devisee for Life, was Executrix, and did assent and grant the Lease to William, both which Reasons my Lord Rolls doth lay hold upon, as material, to govern the Case.

3. William might have assigned his Interest, and then no Remainder could take place, for the Term was gone.

4. He might have had Issue, and that Issue might have assigned, and then it had put all out of doubt.

5. But the main Reason of all, which makes me oppose it, ariseth out of the Record, and is not taken notice of in either of the reports of Rolls, or Jones, or in Rolls's Abridgment. The Record of that Case goes further, for the Record says; There was a farther Limitation upon the Death of Thomas without Issue to go to the Daughter, which was a plain affectation of a Perpetuity to multiply Contingencies. It further appears by the Record, that the Father's Will was made the 10 of Eliz. Dorothy, the Devisee for Life, held it to the 24, and then she granted and assigned the Term to William; he under that Grant held it till the 31 of Eliz. and then regranted it to his Mother, and died; the Mother held it till the 1 of K. James, and then she died; the Assignees of the Mother held it till 14. Jac. and then, and not till then, did Thomas, the younger Son, set up a Title to that Estate; and before that time it appears by the Record, there had been six several Alienations of the Term to Purchasers, for a valuable Consideration, and the Term renewed for a valuable Fine paid to the Lord. And do we wonder now, that after so long an Acquiescence as from 10 Eliz. to 14 Jac. and after such successive Assignments and Transactions, that the Judges began to lie hard upon Thomas, as to his Interest in Law, in the Term, especially when the reasons given in the reports of the Case, were legal Inducements to guide their Judgments, of which there are none in our Case? But then,

Secondly, At last, allowing this Case to be as full and direct an Authority as is possible, and as they would wish, that rely upon it; then I say--

1. The Resolution in Child and Bayly's Case, is a resolution that never had any resolution like it before nor since.

2. It is a resolution contradicted by some resolutions; and to shew, that that resolution has been contradicted, there is----

1. The Case of Cotton and Heath, which looks very like a contrary resolution; there is a term limited to A. for eighteen Years, the remainder to B. for Life, the remainder to the first Issue of B. for Life, this contingent upon a Contingent was allowed to be good, because it would weae out in a short time. But *Rol.* Abr. Tit. Devise, 612

2. To come up more fully and closely to it, and shew you, that I am bound up by the resolutions of this Court, there was a fuller and flatter Case 21 Car. 2. in July 1669, between Wood and Saunders. The Trust of a long Lease is limited and declared thus: to the Father for sixty Years if he lived so long; then to the Mother for sixty Years, if she lived so long; then to John and his Executors if he survived his Father and Mother; and if he died in their Life-time, having issue, then to his issue; but if he die without issue, living the Father or Mother, then the remainder to Edward in tail. Cases in *Chancery* 1 Part. 131

John

John did die without Issue, in the Life-time of the Father and Mother, and the Question was, Whether Edward should take this Remainder after their Death? and it was resolved by my Lord Keeper Bridgeman, being assisted by Judge Twisden and Judge Rainsford, that the Remainder to Edward was good, for the whole Term had vested in John, if he had survived; Yet the Contingency never happning, and so wearing out in the Compass of two Lives in being, the Remainder over to Edward might well be limited upon it.

Thus we see, that the same Opinion which Sir Orland o Bridgeman held when he was a Practiser, and drew these Conveyances, upon which the Question now ariseth, remained with him when he was the Judge in this Court, and kept the Seals; and by the way, I think it is due to the Memory of so great a Man, whenever we speak of him, to mention him with great Reverence and Veneration for his Learning and Integrity.

Object. They will perhaps say, Where will you stop if not at Child and Bayly's Case?

Answ. Where? why every where, where there is not any Inconvenience, any Danger of a Perpetuity; and whenever you stop at the Limitation of a Fee upon a Fee, there we will stop in the Limitaon of a Term of Years. No Man ever yet said, a Devise to a Man and his Heirs, and if he die without issue, living B. then to B. is a naughty Remainder, that is Pell's and Brown's Case.

Now the Ultimum quod sit, or the utmost Limitation of a Fee upon a Fee, is not yet plainly determined, but it will be soon found out, if Men shall set their Wits on work to contrive by Contingencies, to do that which the Law has so long laboured against, the Thing will make it self Evident, where it is inconvenient, and, God forbid, but that Mischief should be obviated and prevented.

The Equitable Reasons of this Case.

I have done with the legal Reasons of the Case: It is fit for us here a little to observe the Equitable Reasons of it; and I think this Deed is good both in Law and Equity; And the Equity in this Case is much stronger, and ought to sway a Man very much to incline to the making good this Settlement if he can. For,

1. It was Prudence in the Earl to take care, that when the Honour descended upon Henry, a little better Support should be given to Charles, who was the next Man, and trod upon the heels of the inheritance.

2. Though it was always uncertain whether Thomas would die without issue, living Henry, yet it was morally certain that he would die without issue, and so the Estate and Honour come to the younger Son: For it was with a careful Circumspection always provided, that he should not marry till he should recover himself into such estate of Body and Mind, as might suit with the Honour and Dignity of the Family.

3. It is a very hard thing for a Son to tell his Father, that the Provision he has made for his younger Brothers is void in Law, but it

it is much harder for him to tell him so in Chancery. And if such a Provision be void, it had need be void with a vengeance; it had need be so clearly void, that it ought to be a Prodigy if it be not submitted to.

Now where there is a Perpetuity introduced, no Cloud hanging over the Estate but during a Life, which is a common Possibility where there is no Inconvenience in the Earth, and where the Authorities of this Court concur to make it good; to say, all is void, and to say it here, I declare it, I know not how to do it. To run so counter to the Judgment of that great Man, my Lord Keeper Bridgman, who both advised this Settlement; and when he was upon his Oath in this place decreed it good. I confess his Authority is too hard for me to resist, though I am assisted by such Learned and Able Judges, and will pay as great a Deference to their Opinions as any Man in the World shall.

If then this should not be void, there is no need for the Merger by the Assignment or the Recovery to be considered in the Case: For if so be this be a void Limitation of the Trust, and they who had notice of it, will palpably break it, they are bound by the Rules of Equity to make it good by making some Reparation. Nay, which is more, if the Heir enter upon the Estate to defeat the Trust, that very Estate doth remain in Equity infected with the Trust; which was the Case of my Lord of Thomond; so also was the Resolution in Jackson and Jackson's Case: So that to me the Right appears clear, and the Remedy seems to be difficult.

Therefore my present Thoughts are, that the Trust of this Term was well limited to Charles, who ought to have the Trust of the whole Term decreed to him, and an Account of the mean Profits, for the Time by-past, and a Recompence made to him from the Duke and Marriot for the Time to come. But I do not pay so little Reverence to the Company I am in, as to run down their solemn Arguments and Opinions upon my present Sentiments; and therefore I do suspend the inrolment of any Decree in this Case, as yet: But I will give my self some time to consider, before I take any final Resolution, seeing the Lords the Judges do differ from me in their Opinions. Lord Chancellor's Opinion.

De Termino Pasch. Anno 34 Car. II. Ro. In Cancell. Sabbati 13 die Maii.

Howard Versus le Duc de Norfolk.

This Day was appointed for final Judgment in this Cause, and it being called,

Mr. Serjeant M. moved: My Lord, We depend upon your Lordship in that Cause for your Opinion.

Mr. S. G. My Lord, In the Case of Howard against the Duke of Norfolk, I do not know whether I may have the Liberty to move this that I am going to offer. It stands now in the Paper now for your Lordship's Judgment, and therefore I speak this that I now offer with great submission, if your Lordship will please to hear it. If you will please to allow my Lord of Arundel's Counsel the Liberty of offering any thing further in the Cause. Possibly it will not become them to offer any thing that hath been said, but if they may be permitted to argue some new Matter if they can find any. Therefore we that are for my Lord of Arundel, desire the Liberty of having some little time till Mr. Keck (who is of my Lord's Counsel, but at present indisposed, and has not yet been heard) can come, which we hope will not be long. We hope it will be no Prejudice to this Cause, which has had so long agitation, to stay a few Days longer. A Week's time sure will break no squares.

Lord Chancellor. I did appoint the first Tuesday in the Term to deliver my opinion in this Case, for I desire to rid my hands of it. But Mr. Keck, who was then at the Bar, did pray that he might argue it once more for the Defendant, and my Lord Duke of Norfolk having never been heard by Mr. Keck, I was willing to hear him. For it was a Cause of moment and difference of Opinions, and there are so many Short-hand Writers, that nothing can pass from us here, but it is presently made publick; and tho' a Man doth not speak in Print, yet what he says shall be immediately put in Print; therefore because Mr. Keck desired it, and to justifie my own Opinion, tho' I had appointed the first Tuesday in the Term, yet I gave till this Day. It is but Reason Mr. Keck should be heard, who has not yet argued it; and if any Man can convince me I am in an Error, or make it appear to me, that I am mistakenin the Law, in the Opinion I have given, which as yet I see no Cause in the World to change, God forbid, but I should hear them; but on the other side, this Cause must not everlastingly be put off, because my Lord Duke's Counsel are not here. Therefore I will give you a Week's time further; but upon this Day sevennight, come or not come, I will give my Judgment in the Cause.

Mr. Serj. M. If your Lordship pleases to put it upon the other side, unless they shew Cause, then the Opinion your Lordship has given to stand.

Lord Chancellor. If my Opinion (which is under the Prejudice of being contrary to that of the three Chief Judges) can be refuted, I am not ashamed to retract any Error I may be convinced of, but truly at present I see no colour to retract it.

Mr. Serj. M. We pray then, my Lord, that we may have this Right done for us, who are for Mr. Howard the Plaintiff, that they on the other side will let us know what particular Points we must go upon; for if they come at large, we may not perhaps be so well provided to answer them.

Lord Chancellor. I suppose they can say nothing to any Point, but that which is the main Point in the Case, the Limitation of the Remainder of a springing Trust after the Entail of a Term, that is to determine upon a Contingency that expired in the time of a Life; a Point which was never argued for Mr. Howard at the Bar, nor stirred by the Counsel.

Mr. Serj. M. I hope we for Mr. Howard shall be heard to justifie your Lordship's Opinion.

Lord Chancellor. What hath been said here at the Beneh on both sides, has been taken in Short-hand, and made publick, I know the Counsell on both sides hath seen it, or will see and look into it well, and if they can give me any reasonable Satisfaction that I am in the Wrong, I shall easily recede from it. But upon any thing yet offered I am of the same mind I was. As to the Learned Judges that assisted me at the Hearing, the Decree is mine, and the Oath that Decree is made upon is mine, theirs is but Learned Advice and Opinion. And therefore if they can satisfie my Conscience, that they are in the Right and I not, well and good; if not, I must abide by that Decree I have made, according to my Conscience. And I will repeat this to you, I go upon these Heads for my own Opinion, and I would be glad any body would answer them. I say, it is against natural Justice, to say that a Man who hath no Estate but what consists in Terms, shall be disabled from settling his Estate, so as to provide for the Contingencies in his Family, that are in immediate Prospect. I say it is a common Case. A Man that is Lessee for Years, assigns his Term in Trust for himself until such a marriage take effect, and after to himself for life, to his Wife for life, with Remainder in Tail to his Children. Is that springing Trust upon the Contingency of the marriage good or not? If it be not good, then what will become of a great many marriage-settlements: If it be good, then why not in this Case as well as that? And I would fain know what difference there is between the Case as it is at the Bar, and if it had been limited thus; If my Lord Arundel had said, that if Thomas die without Issue, living Henry. then the Term for Two hundred Years in Tail should cease, and a new Term should arise upon the same Trust for Charles, that it seems had been well enough; is there

A Repetition of the Reasons.

there any Sense in the Words that can lead a reasonable Man to conclude why there should not be a new springing Term upon the same Truſt. I cannot see any Reason to run this Case [illegible] upon the single Authority of Child and Baily's Case, which has such a Resolution, as never had its like before, nor since, but contradicted by several Resolutions as have been cited, particularly, Wood and Saunders's Case in this Court in my Lord Bridgman's time. These are the Grounds my present Apprehensions go upon; but I will hear Mr. Keck, if it may be in any reasonable Time, and give the Respect to the Duke of Norfolk, that he shall not be surprized, though withal, I must do Mr. Howard the Justice that he be not eternally delay'd.

Then the Day sevennight was appointed; but upon the Continuance of Mr. Keck's Illness, it was put peremptorily for Judgment on the first Saturday in the next Term.

De Term. Trin. Anno Reg. Car. II. 34. in Cancel.

Howard vers. le Duc de Norfolk.

Sabbati 17 *Junii*, Anno Dom. 1682.

Mr. Serj. M. My Lord, We have nothing to do in that Cause, but to pray your Judgment.

Mr. S. G. My Lord, we were in great hopes to have had other Assistances to Day, but it seems we are disappointed of them: That which I shall humbly offer is but short. We are, by your Lordship's Favour, permitted now to offer something if we can, to answer the Objections which your Lordship made, and which were the Ground of your Opinion. We did apprehend them to be these; That Child and Baily's Case was not the same with this Case, and that the Case of Wood and Saunders is the last Resolution of this nature, and will rule this. We do, my Lord, humbly with submission offer these Reasons, why the first Case is the same with this, and the other different from it. Child and Baily's Case, my Lord, tho' it doth differ in some Circumstances, yet it differs in no one that doth immediately concern the limitation. For the Circumstances wherein they differ was the length of the Term being almost expired, the Conveyances over to several Purchasers, and at the end of the Term the Resolution taken. But tho' it differs in these Circumstances, yet these have no influence upon the limitation or the construction of Law upon the limitation. Now the limitation is the same there as it is here, for there it is to one for Life, and to his Son during the whole Term; and if he die without Issue, during the Life of his

his Father and Mother, then the remainder over this remainder was adjudged void. This is the same Case with ours, for in the Case the first remainder actually vested in William the Son, for it was to him and his Assigns during the whole Term, and if he die without Issue, living Father and Mother, then over. This remainder I say was adjudged void, he was actually seized of the whole Interest, which being vested in him, could not be devested upon the contingent Limitations over, upon his death without Issue, living Father and Mother. It is the same in our Case, the Duke of Norfolk has the Interest of this Estate by the Limitation in Tail actually vested in him, and then it cannot be devested by the Rule of Child and Baily's Case upon the Contingency of Thomas's dying without Issue in the Life of Henry; which is during the Life of the now Duke of Norfolk. And in this respect the Case of Wood and Saunders is not the same. It is a Limitation to the Father and Mother for Life, and for 60 years, if they so long live, then to John the Son, if living at the time of the death of Father and Mother, the whole Term. My Lord, this was not a vesting the Estate in John the Son, but a contingent Limitation, that he should take or not. If he were living at the time of the Death of Father and Mother, then he should take; if not, he should not take. There was no Interest vested in him till the Contingency happen'd, and so the Limitations will be different. And that is the Ground that is drawn up in the Decretal Order of the Cause, because this was a contingent Limitation to John, and that never happening, it is all one, as if it had never been limited, and amounts, putting the contingent Limitation, which never happen'd, out of the Case, to no more than a Limitation to the Father and Mother for Life, the remainder over, which is well enough. This is that I have to offer, and I humbly submit it to your Lordship.

Mr. Serj. M. And so we do, and pray your judgment.

Mr. R. I see they are pressing for your Lordship's judgment, and I know not whether it will become me to interpose with any thing.

Lord Chancellor, Say, say, for this is a Cause that deserves patience.

Mr. R. No man, my Lord, can have any great Encouragement to add any thing after all the Arguments that have been made in this Cause, or can hope to offer that which will be very material and new, but I desire to have leave to say this in short. My Lord, there be two Deeds by which this Settlement is made, as a provision for the second Son of this Family, and the younger Children, and therein it doth perhaps appear, that if the Bulk of the Estate and the Honour should come to the second Son, then the Settlement of this part that is made upon the second Son, was intended to come to the now Plaintiff, and the younger Children. This is the intention of the two Deeds. By the first Deed the Estate of Freehold and Inheritance is limited in Tail. By the second Deed the trust is declared of the term for 200 Years that is limited

mitted to Henry, and so over. And therein it differs from the Case of Wood and Saunders; for the trust of the term doth rest in Henry, till the Contingency happen; but in Wood and Saunders's Case, there it is limited to the Father and Mother for 60 Years, if they lived so long, then to John and his Heirs Males, in case he survive his Father and Mother, and the Trust to be assigned to him accordingly, and if he die without Issue in the Life of the Father and Mother, then to Edward his Brother. No man can say that ever any thing here did rest in John, for it was but limited to him after his Father and Mother's life, in case he survived them, but it never vested in him, and so it differs from this Case. For here the Trust of the Term did rest in the Duke of Norfolk till the Contingency did happen. And as that is the difference between the two Cases, and I do apprehend it is a difference with great reason from Wood and Saunders's Case, so that which I infer from it is this, that where the trust of a Term is limited to a man and his issue, and his Heirs Males, and that vested in him, if he die without Issue, or which is much a stronger Case, tho' the Contingency be restrained within the compass of a life, or of a certain time that is to wear out in a reasonable distance, yet coming after a Limitation in Tail cannot carry the remainder over. For if you once admit it during one life, you must admit it during twenty lives, for the reason is the same as to twenty, as it is to one, if they be all in being, and perhaps the reason will be the same as to twenty lives all in being, and for the life of one Person more. Then if the trust of a term where it is once vested in Tail, can never be well limited over, tho' restrained within the contingent distance of a reasonable time; this Limitation to the Plaintiff can never be good. My Lord, I crave leave to offer your Lordship one Case or two; suppose that a term for Years, or the Limitation of the trust of a Term for Years (for I think there is the same construction made of both) be limited to J. S. and the Issue of his Body, and if J. S. die without Issue within 100 Years (for the purpose) or within twenty Years, then to go over to J. N. that cannot be apprehended to be good, but void; for there is no difference between 1000 or 100 or 20 Years, yet 20 Years is but a reasonable time, and not more in prospect than one or ten lives. If a man limit the trust of a term, or a term it self to J. S. and the Issue of his Body; and if he die without Issue before 21, then to go over to J. N. This is a reasonable distance of time, and yet I believe this will not be allowed to be good and well limited over. And the reason is, where once a Term is limited to a man and his issue, this in a reasonable construction of Law carries the whole Term (for it was a good while before they gained the point of remainders after lives) and (if after it be said,) if he die without Issue within 100 Years, or before 21, that restriction will not help it as we think. Then where is the reason or sense that it should be otherwise, if he die without Issue in the

life

life of another Person? Truly, my Lord, it is very hard to find out a true difference between the Cases where the Restriction is for the life of a certain Person, and where it is upon a certain number of Years. My Lord, I would put this Case upon Wood and Saunders's Case, which is the Authority that is so much prest upon us. Suppose that Case had been thus; to the Father for 60 Years, if he so long live; to the Mother for 60 Years, if she so long live, and then instead of that Limitation to John, in case he survived his Father and Mother: Suppose it had been to the first Son of the Father and Mother, and the Heirs of his Body, and if such first Son die without Issue in the life-time of his Father and Mother, then it should go over to another Person. Had it then been good? Surely no. What is the difference? Why this, it being to John, in case he survived his Father and Mother, nothing vested. But if it had been to the first Son, and the Heirs of his body, and they have a Son, there it differs, for it is actually vested in him. And there the Limitation over to a Stranger would not be good, even admitting the Case of Wood and Saunders to be uncontroulable. Another Objection your Lordship made, was about the necessary Limitations of the Trusts of terms by Termers upon Marriage Settlements to a man's self, till the marriage take effect, and then to such and such uses; and the Objection is, why should it not be as good a Limitation of the trust of a term, or of a term it self, as well as of an inheritance? That will not reach our Case, therefore I need not say any thing to it, whether it would be so or no. But suppose this Case, there be two Brothers, the eldest hath no Children, the younger Brother hath a Son, and is a going to marry the Son, but hath but a small Estate to give him. The elder Brother has a Term for Years, and has a mind to provide for the Son of his younger Brother, and his intended Wife, and he limits the Trust of his Term thus; to the use of himself, and his Executors till the marriage be had; but if he die, or provided he die before the marriage had, without Issue, living his younger Brother, the Father of him that is to be married, then to the use of that Son, and so on. We do make a great doubt, whether the Limitation of the Trust of the Term there, would be good or not, upon the difference of Child and Baily's Case, that has been so often mentioned in this Cause, and was so solemnly resolved. The Resolution of which Case, and that also of Wood and Saunders, we submit to your Lordship's Consideration. As for the intention of the Parties in this Settlement, we cannot but say, it was intended as a Provision, that when the Bulk of the Estate, and the Honour came to the Duke, his younger Brothers should have an increase of their Portions. But it is as plain the intent does fail as to all the other younger Children, because the construction of Law will not support it. So that the intent without the Rule of Law to maintain it, will signify nothing.

Mr.

Mr. H. If your Lordship will please to give me leave, I think I may offer something that has not yet been observed; we do not trouble your Lordship or our selves out of a presumption, that we shall so far prevail, as to alter the Opinion your Lordship has delivered; but truly my design is to offer some Reasons, why I hope your Lordship will be pleas'd to take some further Consideration of the matter. Not, but that I know your Lordship did very seriously deliberate upon it, before you delivered your Opinion, and you have been pleased to tell us the Reasons you went upon, and they were two. First, upon the Case of Wood and Saunders in this Court; And Secondly, upon the natural Reason and Justice, that a man that has no other Estate, but Terms for Years, should have a power to settle those Terms, so as to provide for the Contingencies of his Family. That a settlement of a term upon Trustees to himself, till the marriage take effect, and then over, shall be good; this might be resembled to Pell and Brown's Case, and so come within the same reason. Now my Lord, with submission, we have this to offer. This trust of this term in our Case, was first to attend the inheritance, and that was an Estate-Tail limited; but then there is a Contingency added to this trust, to this trust of the Term, that if Thomas die without issue, living Henry, then to Charles, and as it hath been said already, it is very plain this Entail of the Term did actually vest. Then the single first Question is, whether upon the Contingency happening, the death of Duke Thomas without issue, it shall devest, and a springing trust arise to the now Plaintiff Mr. Charles Howard. It is said there was a just care taken for him that was a younger Son; so there was: but a like care was taken for the other five, Bernard, &c. as well as for him. Now then the Case lies upon this doubt, with submission to your Lordship, whether this can enure by way of a springing Trust by a new Creation. We think that cannot be; for here being once an Estate-Tail limited in a term that was to attend an Estate-Tail of the inheritance, the Remainder over must be void in the very Creation. My Lord, I have observed, ever since I have had the Honour to practise at this Bar, and very many particular instances might be given, that when the Judges have been upon the Cases called to advise here, they would not go beyond, nor think fit that this Court should, beyond the Resolution in Manning's Case. And they have often said, if that Case were now to be adjudged, it would receive another kind of Resolution. The Judges gave that Resolution by way of Executory devise, and now I think, since that, there have been more Suits in this Court of this Nature since the King's Restauration, than were in forty Years before. For cunning People will be always finding out Perpetuities, and are fond of Limitations tending to Perpetuities, not only in Inheritance, but in Terms for Years. After Manning's Case, the Conveyancers did contrive these Trusts of Terms for Years to go beyond that Case. For they seemed to argue thus; That being good by way of Executory devise, then we will

Trusts of Terms, when introduced.

will declare a Trust, and that the Law has nothing to do with, it is a Creature of Equity, and governable by Equity. And I have seen a Conveyance of this nature made by my Lord of Leicester to Marriot and Western, drawn 1658. where there was the trust of a term limited over after an Estate-Tail; but that was never insisted upon to be good, all the Cases being otherwise. If then it be not good by way of Executory Devise, it cannot be good by way of Limitation of the trust of a term. Now in this Case, certainly it would not be a good Remainder by way of Executory Devise. For when a term is devised to end in tail, no man will say a Remainder of the term can be limited over. As for the Case of Wood and Saunders, that, my Lord, I conceive had been good by way of Executory Devise. A Man that hath a term, deviseth it to his Wife for Life, and if John his Son be living at the death of his Wife, then to him in tail; but if he die without issue, living the Wife, then to Edward, that might be good. For it is a Condition precedent as to John, and there he must survive his Father and Mother, or he takes nothing; but he dying before them, never vested in him at all, and so might well vest in Edward. But in our Case it is void in the Creation, because in the Case here before your Lordship it did vest, and was to attend the inheritance, when the Contingency happens: Can it then enure to the Plaintiff by way of springing Trust? Surely no. In Wood and Saunders's Case it never vested, in our Case it did vest, But I must, my Lord, crave leave to say one Word to another Point in the Case, and that is the Recovery. When contingent Remainders in Law, in Cases of Settlements, may be by any Act in Law barred, this Court, I conceive, will not set them up again. Now in this Case before the Contingency happened, when the Estate-tail of the inheritance was in my Lord Duke of Norfolk, and the Lease for Two hundred Years attendant upon that Estate-tail, then doth my Lord Duke suffer a common Recovery, which we apprehend hath so barred and destroyed this Term, that this Court will never interpose to set it up again. My Lord, That which on the Duke's Behalf we now desire is, that your Lordship will be pleased to take some further time to consider of it, and deliver your Judgment the next Term.

Mr. Serj. M. My Lord, I did not expect, I must confess, an Argument at this rate, and at this time; but your Lordship in great Tenderness and Favour hath given them leave to do it: But after all, under favour, what they say is a great mistake of the Case. If they had observed what was said, and truly applied it, they would have answered themselves. What interpretation in such a Case shall be made, or not be made, is meerly matter of Equity, which upon the Circumstances of every Case is governable by the Circumstances. I would not go after their Example to argue, to support, as they have done, to overturn the Opinion of the Court that has been delivered. But I would offer this to your Lordship; There is a great mistake in calling this a Remainder, it is no such thing as a Remainder:

No Remainder, but a springing Trust upon a Contingency

It is indeed a springing Trust upon a Contingency: But pray, my Lord, consider how it stands here in Equity before your Lordship. Here is a noble and great Family, the Heir of it under the Visitation of the Hand of God, which no one could remove but God alone; here are a great and numerous Issue to provide for, that Provision is made according to the Rules of Nature and Justice; and it being necessary to be done, no man could contrive it better than this Settlement. My Lord, they frighten us with the word Perpetuity. It is true, a Perpetuity cannot be maintained, that is, an Inheritance not to be aliened or barred, or that can never end. But here is but the name of a Perpetuity, and certainly, that must be a strange and monstrous Perpetuity, that must determine within the short space of a Life. A Perpetuity is an Estate that can never be barred. And Littleton hath a Rule, that there is no Estate but can be barred, if all the Persons concerned in it join. But it is under favour a Contradiction, and a great one, to call this a Perpetuity; a monstrous one, I say it is, where any man can see the end of it; and whereas to the Circumstances of the Case, the Family could not otherwise be well provided for. And whereas Perpetuities are abhorred, it is upon the inconvenience, which hinders other Provisions in case of necessity; and it were indeed an inconvenience, that every Family should have the Misfortunes that were in this, and not be able to provide some sort of Remedy for them. Some Cases, my Lord, have been put by the other side now, which under favour are nothing to the purpose, and would need no other Answer than they give themselves. But truly I think it is not fit for the Advantage of the Publick, that after a Case has been so solemnly argued, the Councel should dispute the Opinion of the Court.

My Lord, I would desire to say a word in answer to some things that have been urged. As to the Case that Mr. H--ch--s put, I think it had been good by way of Executory Devise. To one and his Heirs Males, till such an one returns from Rome, or the like, had been good, especially where the Determination depends but upon the expiring of a short Life. But all this is but Petitio principii, the same thing over add over. As for Child and Baily's Case, there are several things that differ it from ours. There it hath a Semblance of our Case, of one dying without Issue; but is it there upon a Life, and not within a Life as ours doth. And in our Case, my Lord, this Limitation to Henry is a Limitation of a Term attendant upon an Inheritance, and then it is plainly as if the Limitation of a Freehold Estate were to one and the Heirs of his Body, and if such an Accident happens, the Estate to cease, and be to another for 100 Years. As it is in Henry attendant upon the Inheritance; it should not if Henry had died have gone to his Executor, but to his Heir. Then, as to Charles, here is a Condition that determines the whole Trust as to Henry, and there it begins to be first a Limitation of a Term in gross. He that creates a Term attendant upon an Inheritance, may sever it if he will; and if he may sever it,

He that creates a Term attendant upon an Inheritance, may sever it if he will.

may he not limit it upon a Contingency, that upon such a Contingency it shall be severed? All Conditions are either precedent, or subsequent. Precedent to create a springing Trust, and Subsequent to destroy the former Estate. In Wood and Saunders's Case, John did not take, but upon the precedent Condition; but Edward took it upon the subsequent Condition. In our Case this Condition is both; as to the destroying of the Trust to Henry it is a subsequent Condition; but as to the creating a new Trust to Charles, it is a precedent Condition. My Lord, I must not undertake to argue this Case, but only to say a little to what was said on the other side; we hope it being upon so short a Contingency which has now happen'd, the Limitation of this Term to the Plaintiff is good, and we pray your Judgment for him.

THE Lord Chancellor's SECOND ARGUMENT.

Lord Chancellor. I Am not sorry for the Liberty that was taken at the Bar to argue this over again, because I desired it should be so; for in truth I am not in love with my own Opinion, and I have not taken all this time to consider of it, but with very great willingness to change it, if it were possible. I have as fair and as justifiable an Opportunity to follow my own inclinations (if it be lawful for a Judge to say he has any) as I could desire; for I cannot concur with the three Chief Judges, and make a Decree that would be unexceptionable: But it is my Decree, I must be saved by my own Faith, and must not decree against my own Conscience and Reason.

It will be good for the Satisfaction of the Publick in this Case, to take notice how far the Court is agreed in this Case, and then see where they differ, and upon what Grounds they differ; and whether any thing that hath been said be a Ground for the changing this Opinion. The Court agreed thus far:

That

The Limitation of the Trust of a Term, and the Limitation of the Estate of a Term all one.

That in this Case it is all one, the limitation of the Trust of a Term, or the limitation of the Estate of a Term, all depends upon one and the same Reason. The Court is likewise agreed (which I should have said first, to dispatch it out of the Case, that it may not trouble the Case at all) that the Surrender of Marriot to the Duke of Norfolk, and the common Recovery suffered by the Duke, are of no use at all in this Case. For if this limitation to Charles be good, then is that Surrender and the Recovery a Breach of Trust, and ought to be set aside in Equity; so all the Judges that assisted at the hearing of this Cause agreed: If the Limitation be not good, then there was no need at all of a Surrender to bar it, nor of the common Recovery to extinguish it.

But then we come to consider the limitation, and there it is agreed all along in Point of Law, That the measures of the limitations of the Trust of a Term, and the measures of the limitations of the Estate of a Term, are all one, and uniform here, and in other Cases, and there is no difference at Chancery or at Common Law, between the Rules of the one and the Rules of the other; what is good in one Case, is good in the other. And therefore in this Case the Court is agreed too, that the Limitations made in this Settlement to Edward, &c. are all void, for they tend directly and plainly to Perpetuities, for they are limitations of Remainders of a Term in gross after an Estate-tail in that Term, which commenceth to be a Term in gross, when the Contingency for Charles happens.

Thus far there is no difference of Opinion: But whether the limitation to Charles, if Thomas die without issue, living Henry, whereby the Honour of the Earldom of Arundel descends upon Henry; I say, whether that be void too, is the great Question of this Case wherein we differ in our Opinions.

It is said that is void too; and yet (sever it from the Authority of Child and Baily's Case, which I will speak to by and by) I would be glad to see some tolerable Reason given why it should be so; for I agree it is a Question in Law here upon a Trust. as it would be elsewhere upon an Estate; and so the Questions here, are both Questions of Law and Equity. It was well said, and well allowed by all the Judges, when they did allow the Remainders of Terms after Estates-tail in those Terms to be void. I shall not devise a Term to a Man in tail with Remainders over; the Judges have admirably well resolved in it, and the Law is settled, (and Matthew Manning's Case did not stretch so far) because this would tend to a Perpetuity.

Remainders of Terms after Estates-Tail in those Terms, are void.

Now on the other side, I would fain know, when there is a Case before the Court, where the limitation doth not tend to a Perpetuity, nor introduceth any visible inconvenience, what should hinder that from being good: For tho' if there be a tendency to a Perpetuity, or a visible inconvenience, that shall be void for that Reason; yet the bare limitation of the Remainder after an Estate-tail, which doth not tend to a Perpetuity, that is not void. Why? because it is not? I dare not say so; see then the Reasons why it is so. The

Yet the bare Limitation of the Remainder after an Estate Tail, which doth not tend to Perpetuity, is not void.

Reasons that I lie under the load of, and cannot shake off, are these.

The Law doth in many Cases allow of a future contingent Estate to be limited, where it will not allow a present Remainder to be limited; and that Rule, well understood, goeth through the whole Case. How do you make that out? Thus: If a Man have an Estate limited to him, his Heirs and Assigns for ever, (which is a Fee-simple) but if he die without issue, living J. S. or in such a short time, then to J. D. tho' it be impossible to limit a Remainder of a Fee upon a Fee, yet it is not impossible to limit a contingent Fee upon a Fee. And they that speak against this Rule, do endeavour as much as they can to set aside the Resolution of Pell and Brown's Case, which (under favour) was not the first Case that was so resolved; for, as I said before, when I first delivered my Opinion, it was resolved to be a good Limitation. 10 Eliz. in the Case of Hude and Lyon, 3 Leonard 64. which by the way is the best Book of Reports of the later ones that hath come out without Authority. If that be so, then where a present Remainder will not be allowed, a contingent one will. If a Lease for Years come to be limited in tail, the Law allows not a present Remainder to be limited thereupon, yet it will allow a future Estate arising upon a Contingency only, and that to wear out in a short time. The Reasons.

But what time? and where are the Bounds of that Contingency? You may limit, it seems, upon a Contingency to happen in a Life: What if it be limited, if such a one die without issue within 21 Years, or 100 Years, or while Westminster-Hall stands? Where will you stop if you do not stop here? I will tell you where I will stop: I will stop where-ever any visible inconvenience doth appear; for the just Bounds of a Fee-simple upon a Fee-simple are not yet determined, but the first inconvenience that ariseth upon it will regulate it.

First of all then, I would fain have any one answer me, where there is no Inconvenience in this Settlement, no Tendency to a Perpetuity in this Limitation, and no Rule of Law broken by the Conveyance. What should make this void? And no Man can say that it doth break any Rule of Law, unless there be a Tendency to a Perpetuity, or a palpable inconvenience. Oh, yes, Terms are meer Chattels, and are not in Consideration of Law so great as Freeholds, or Inheritances. These are Words, and but Words, there is not any real difference at all, but the Reason of Mankind will laugh at it: Shall not a Man have as much Power over his Lease as he has over his Inheritance? If he have not, he shall be disabled to provide for the Contingencies of his own Family that are within his view and prospect, because it is but a Lease for Years, and not an Inheritance of a Freehold. There is that Absurdity in it which is to me insuperable, nor is the Case that was put, answered in any degree. A Man that hath no Estate but what consists in a Lease for Years, being to marry his Son, settled this Lease thus: In Trust for himself in tail, till the Marriage take effect; and if

the Marriage take effect while he lives, then in Trust for the married Couple; is this future Limitation to the married Couple good or bad? If any Man say it is void, he overthrows I know not how many Marriage-Settlements: If he say it is good, why is it not a future Estate in this Case as good as in that, when there is no tendency to a Perpetuity, no visible inconvenience?

All Men are agreed, (and my Lord Chief Justice told us particularly how) that there is a way in which it might be done, only they do not like this way; and I desire no better Argument in the World to maintain my Opinion, than that; For, says my Lord Chief Justice, suppose it had not been said thus; if Thomas die without issue, living Henry, then over to Charles; but thus, if it happens that Thomas die without issue in the Life of Henry, &c. then this Term shall cease, and there shall a new Term arise and be created to vest in Charles in Tail, and that had been wonderful well, and my Lord of Arundel's Intention might have taken effect for the younger Son. This is such a Subtilty as would pose the Reason of all Mankind: For I would have any Man living open my Understanding so far, as to give me a tolerable Reason why there may not be as well a new springing Trust upon the same Term to go to Charles, upon that Contingency, as a new springing Lease upon the same Trust: For the latter doth much more tend to a Perpetuity than the former doth, I am bold to say it.

A new springing Trust upon the same Term, as reasonable as a new springing Lease upon the same Trust.

But I expect to hear it said from the Bar, and it has been said often, the Case of Child and Baily is a great Authority; so it is. But this I have to say to it, first, the Point resolved in Child and Baily's Case was never so resolved before, nor ever was there such a Resolution since. Pell and Brown's Case was otherwise resolved, and has often been adjudged so since. In the next place, I will not take much pains to distinguish Child and Baily's Case from this, tho' the word (Assigns) and the grant of the Remainder by the Mother, who was Executrix, are things that Rolls lays hold on as Reasons for the Judgment. But I know not why I may not, with Reverence to the Authority of that Case, and the Learning of those that adjudged it, take the same Liberty as the Judges in Westminster-Hall sometimes do, to deny a Case that stands single and alone of it self. And I am of Opinion the Resolution in that Case is not Law, tho' there it came to be resolved upon very strange Circumstances to support such a Resolution; for the Remainder of a Term of Seventy six Years is called in question when but fifteen Years of it remained, and after the Possession had shifted hands several times, and therefore I do not wonder that the Consideration of Equity swayed that Case.

But I put it upon this point; may consider, there is nothing in Child and Baily's Case that doth tend to a Perpetuity, nor any thing in the Settlement of the Estate there, that could be called an Inconvenience, nor any Rule of Law broken by the Conveyance; but it is absolutely a Resolution quia volumus. For it disagrees with all the other Cases before and since; all which have been otherwise resolved; but

but it is a Resolution. I say, meerly because it is a Resolution. And it is expresly contrary to Wood and Saunders's Case, which no Art or Reason can distinguish from our Case or that. For here was that Case which was clipt and minced at the Bar, but never answered. Wood and Saunders's Case is this: To the Husband for sixty Years, if he lived so long; to the Wife for sixty Years, if she lived so long; then if John be living at the time of the death of the Father and Mother, then to John; but if he die without issue, living Father or Mother, then to Edward. Suppose these Words (living Father or Mother) had been out of the Case, and it had been to John, and if he die without issue, to Edward, will any Man doubt, but then the Remainder over had been void, because it is a Limitation after an Express Entail? How came it then to be adjudged good! because it was a Remainder upon a Contingency, that was to happen during two Lives, which was but a short Contingency, and the Law might very well expect the happening of it? Now that is this Case, nay ours is much stronger; for here it is only during one Life, there were two.

Remainder upon a Contingency that may happen in a short time, good.

The Case of Cotton and Heath in Rolls comes up to this: A Term is devised to A. for eighteen Years; the Remainder to B. for Life, the Remainder to the first Issue Male of B. which is a contingent Estate after a Contingency, and yet adjudged good, because the happening of the Contingency was to be expected in so short a time. Now that Case was adjudged by my Lord Keeper Coventry, Mr. Justice Jones, Mr. Justice Crook, and Mr. Justice Berkley, as Wood and Saunders's Case was by my Lord Keeper Bridgman, M. Justice Twisden, and Mr. Justice Rainsford; so that however I may seem to be single in my Opinion, having the misfortune to differ from the three learned Judges who assisted me, yet I take my self to be supported by seven Opinions in these two Cases I have cited.

Roll. Abr. Tit. Devise 612.

Cases in *Chancery*, 1 Part. 131.

If then this be so, that here is a Conveyance made which breaks no Rules of Law, introduceth no visible inconvenience, savours not of Perpetuity, tends to no ill Example, why this should be void only, because it is a Lease for Years, there is no Sense in that.

Now if Charles Howard's Estate be good in Law, it is ten times better in Equity. For it is worth the considering, that this Limitation upon this Contingency happening, (as it hath, God be thanked) was the considerate Desire of the Family, the Circumstances whereof required Consideration, and this Settlement was the Result of it, made with the best Advice they could procure, and is as prudent a Provision as could be made. For the Son now to tell his Father that the Provision that he had made for his younger Brother is void, is hard in any Case at Law; but it is much harder in Chancery, for there no Conveyance is ever to be set aside, where it can be supported by a reasonable Construction, and here must be an unreasonable one to overthrow it.

No Conveyance to be set aside in *Chancery*, where it can be supported by a reasonable Construction

I take

I take it then to be good both in Law and Equity; and if I could alter my Opinion, I would not be ashamed to retract it; for I am as other Men are, and have my Partialities as other Men have. When all this is done, I am at the Bar desired to consider further of this Cafe: I would do so, if I could justify it; but Expedition is as much the right of the Subject, as Justice is, and I am bound by Magna Charta, Nulli negari, nulli differe Justitiam. I have taken as much pains and time as I could to be informed; I cannot help it if wiser Men than I be of another Opinion; but every Man must be saved by his own Faith, and I must discharge my own Conscience.

Expedition as much the Right of the Subject as Justice is.

I have made several Decrees since I have had the Honour to sit in this Place, which have been reversed in another Place, and yet I was not ashamed to make them, nor sorry when they were reversed by others. And I assure you, I shall not be sorry if this Decree which I do make in this Cafe be reversed too; yet I am obliged to pronounce it, by my Oath and by my Conscience. For I cannot adjourn a Cafe for difficulty out of an English Court of Equity into the Parliament; there never was an Adjournment Propter Difficultatem, but out of a Court of Law where the Proceedings are in Latin. The Proceedings here upon Record are in English, and can no way now come into Parliament, but by way of Appeal, to redress the Error in the Decree. I know I am very likely to err, for I pretend not to be infallible; but that is a thing I cannot help. Upon the whole matter, I am under a Constraint, and under an Obligation which I cannot resist. A Man behaves himself very ill in such a Place as this, that he needs to make Apologies for what he does; I will not do it. I must decree for the Plaintiff in this Cafe, and my Decree is this:

Of Cafes adjourn'd *Propter Difficultatem.*

That the Plaintiff shall enjoy this Barony for the residue of the Term of Two hundred Years; the Defendant shall make him a Conveyance accordingly, because he extinguished the Trust in the other, and the Term contrary to both Law and Reason, by the Merger and Surrender, and common Recovery. And that the Defendants do account with the Plaintiff for the Profits of the Premisses by them or any of them received since the Death of the said Duke Thomas, and which they or any of them might have received without wilful default; and that it be referred to Sir Lacon William Child, Knight, one of the Masters of this Court, to take the said Accompt, and to make unto the Defendants all just Allowances; and what the said Master shall certifie due, the said Defendants are to pay unto the Plaintiffs, according to the Master's Report herein to be made: And that the Defendants shall forthwith deliver the Possession of the Premisses to the Plaintiff, and that the Plaintiff shall hold and enjoy the said Barony of Grostock, with the Lands and Tenements thereto belonging, for the residue of the said Term of Two hundred Years, against the Defendants, and all claiming by, from, or under them.

The Decree.

them. And it is further ordered and decreed, That the said Defendants do Seal and Execute such a Conveyance of the said Estate to the Plaintiff as the Master shall approve of, in case the Parties cannot agree the same; but the Defendants are not to pay any Costs of the Suit.

Die Veneris, 19 Junii, 1685.

The Decree affirmed in *Chancery*.

After hearing Councel two several Days upon the Petition and Appeal of Charles Howard Esq; shewing, That his Father intended a Provision for his younger Children, by Deed, made by Advice of Eminent Councel, and did settle the Barony of Grostock, and other Lands, of the Value of Five hundred Pounds per Annum, in Trustees, in order thereunto; and that after a long Suit in Chancery, wherein the Petitioner was Plaintiff, against his Grace the late Duke of Norfolk, the Marquess of Dorchester, Henry Lord Mowbray, and Richard Marriot Esq; Defendants, the Cause coming to be heard before the Lord Chancellor Nottingham, on the 17th of June, in the Four and Thirtieth Year of his late Majesty's Reign, of Glorious Memory; who after several Days Hearing, did declare his Opinion to be, That the Petitioner had a good Title to the Barony of Grostock, and other the Lands in question; and decreed the Defendants to account to him for the Profits thereof by them received after the Death of Thomas, late Duke of Norfolk; which Decree was signed and enrolled, and the Petitioner actually vested in the Possession of the said Manors and Premisses; and further sheweth, That the Defendants, the late Duke of Norfolk, the Lord Mowbray, now Duke of Norfolk, and Richard Marriot, exhibited a Bill of Review into the High Court of Chancery, for reversing the said Decree; to which the Petitioner put in a Plea, and Demurrer: Which being argued on the 15th of May, in the Five and thirtieth Year of the Reign of our late King Charles the Second, before the Right Honourable the Lord Keeper of the great Seal of England, who after hearing Councel on both sides, over-ruled the said Plea and Demurrer, and reversed the Decree aforesaid; and ordered a Writ or Writs of Restitution, to be directed to the Sheriffs of Cumberland and Westmorland, to put the Plaintiffs in the Bill of Review in Possession; which accordingly was done, as in the Petition, amongst other things, is suggested; and prayed a Reversal of the last Decree; as also upon Answer of the Right Noble Henry Duke of Norfolk, Earl Marshal of England, and Richard Marriot Esq; put in thereunto. And after due Consideration had of what was offered at the Bar

by Counsel on either part thereupon, it was resolved and adjudged by the Lords Spiritual and Temporal, in Parliament assembled, That the said Decree made in the High Court of Chancery, on the 15th of May, in the Five and thirtieth Year of the Reign of the late King Charles the Second of Glorious Memory, in behalf of the late Duke of Norfolk, and Richard Marriot Esq; be and is hereby reversed; and that the Decree made in the said Court of Chancery, on the 17th of June, in the Four and thirtieth Year of His late Majesty's Reign, in behalf of Charles Howard Esq; the now Petitioner, Be, and Is hereby affirmed.

JOHN BROWNE, Cler. Parl.

THE

THE ARGUMENTS OF THE Lord Keeper *SOMERS*, THE Lord Chief Juſtice *HOLT*, Lord Chief Juſtice *TREBY*, AND Mr. *BARON POWEL*, When they gave JUDGMENT for the Earl of BATH.

Die Martis 12 Decembris, 1693. In the *Middle-Temple-Hall*, Com. *Mountague* & alii verſus, Com. *Bathen.* & al. & econtra.

THis Day being appointed by my Lord Keeper to hear the Opinions of the Two Chief Juſtices, and Mr. Baron Powel, who aſſiſted at the hearing of this Cauſe, and to deliver his Lordſhip's own Judgment therein; Mr. Attorney-General moved on the behalf of the Earl of Mountague, &c. for the Judgment of the Court; and Mr. Baron Powel delivered his Opinion firſt.

Baron Powel's Argument.

Mr. Baron Powel. The Queſtion in this Caſe is, Whether there be any ground in Equity, to ſet aſide a Deed of Releaſe, made in July 81, for the Settlement of the late Duke of Albemarle's Eſtate, by

Vid. the Case at large, *inf.*

by which my Lord of Bath claims. The Validity of this Deed hath been tried at Law upon an Ejectment in the Court of King's-Bench, by Direction of this Court, where the Title has been found for the Earl of Bath by the strength of this Deed: So that it must be agreed my Lord of Bath hath a good Title at Law, because the Verdict hath found it so, and all Parties concerned have hitherto acquiesced under this Verdict.

Whether a Deed on which a Tryal at Law hath been, may be set aside in Equity.

This Case comes now back upon the Equity reserved, and it is only now to be considered, what matters of Equity have been offered to avoid this Title thus found at Law. And those I think may be reduced to Five Heads.

Objections.

First, That this Deed was obtained by Surprize and Circumvention.

Secondly, That it was a Concealed and a Forgotten Deed.

Thirdly, That this is a Deed attendant upon a Will, and so revocable in its own Nature, altho' it had no Power of Revocation in it.

Fourthly, That there is an implied Trust in this Deed, that the Duke might have charged the Estate to the full Value, and consequently might well dispose of it in Equity.

Fifthly, That the great Solemnity and Deliberation used about making the last Will, and the publishing that Will, do amount to a Revocation in Equity. notwithstanding that the Circumstances of the Power are not strictly pursued.

That, it having been affirmed by a Verdict at Law, it ought not.

I am of Opinion in this Case, that this Deed having been affirmed by a Verdict upon a solemn Tryal at the Bar at Law, none of these matters are sufficient for to ground a Decree in a Court of Equity, to set aside this Deed; and I shall give you my Reasons for this Opinion in the same order I mentioned those Heads in, with particular Answers to the particular Objections under each Head.

Answer to the first Objection. Surprize, what.

1. It is said, This is a Deed that was obtained by Surprize and Circumvention. Now I perceive this word Surprize is of a very large and general Extent. They say if the Deed be not read to, or by the Party, that is a Surprize: Nay the Mistake of a Councel, that draws the Deed either in Misrecitals, or other things, that is a Surprize of a Councel, and the Surprize of the Councel must be interpreted the Surprize of the Client. These things have been urged in this Case, and I thought fit to mention them for the introducing my Reason against this Head of Argument: And it is this:

Surprize not sufficient to set aside a Deed after a Verdict, unless mix'd with Fraud.

That if these things be sufficient to let in a Court of Equity to set aside Deeds found by Verdict to be good in Law, then no Man's Property can be safe: I hardly know any Surprize that should be sufficient to set aside a Deed after a Verdict, unless it be mixed with Fraud, and that expressly proved; and I know not of any such proved in this Case.

It is true, Duke George by his Will, and the Settlement made upon his Son at his Marriage, takes no notice of, nor makes any

Provision for the Earl of Bath; but that, I take it, is not to be regarded as any way material at all, because he takes no notice, in either of them, of any body else but him that was his heir. But I must observe here by the way, that there was not only a very near Relation between Duke George and the Earl of Bath, but a very intimate Friendship cultivated by mutual Offices of Kindness between them to his Death. And I must mention one particular, because to me it seems a clear Answer to this Objection, that is, his making no Provision for the Earl in the Will, or Settlement, might be the Occasion why Duke George did make such an earnest Application to King Charles the Second, that upon failure of his Issue Male, his Majesty would be pleased to bestow the Dukedom upon the Earl, and anner Theobalds to it, which would then revert to the Crown. And that King did often promise he would, and afterwards did it solemnly under the Sign Manual.

But then it is said, that after this D. Christopher made his Will, and therein there is no notice taken of any such Disposition of his Estate to the Earl of Bath; But that is not, I think, to be regarded neither, because that was a Will only of his Personal Estate, and made when he was under Age, and could not dispose of his Real Estate.

Then come we to the Year 1675, when the Will was made, to which this Deed has some relation, and by that Will D. Christopher doth settle a great part of his Estate, upon failure of Issue of his own Body, upon my Lord of Bath. There is no pretence of any surprize upon the Duke when he made his Will, and it is plain then he had an intention that my Lord of Bath should have a great Share in his Estate if he died without Issue.

Now then it is to be considered what there is of Proof in this Case, of any thing that might be a ground to conceive why he should alter this intention between the Years 1675 and 1681, when this Deed was made. There is no proof of any misunderstanding between the Duke and the Earl in that interval; but on the contrary, that there was a continual friendship and intercourse of Kindness between them all the while, as doth appear by a continual Succession of Letters and other Correspondencies passing between them in those Years, one of which I cannot chuse but take notice of, because of the Date to it, to wit, in June 1681. upon my Lord Landsdown's intention to travel; wherein the Duke takes notice of the Interest he had in my Lord of Bath's Family, and particularly in his eldest Son, as the greatest, next to that of the Earl himself: And, I say, I mention this Letter because of the Date, that it is so very near the Date of the Deed, that it is possible the Deed was then made, because it was within a month after that Letter, Sealed and Executed; therefore it might well be referred to in it.

Next this appears to be a Deed drawn by the D. of Albemarle's own Councel, Sir Thomas Stringer; for it is proved the Paper-draught is all of his Son's hand-writing, except the first and last Sheet, and all of it interlined with Sir Thomas his own Hand: Errington has proved the Abstract of all Sir Thomas his Hand, with the very Date in it, and swears that Sir Thomas examined it with him. Now is it to be imagined that Sir Thomas Stringer should prepare such a Settlement for the Duke to execute without any Order or Instructions from him about it? No, certainly that can't be thought. But they say Sir Thomas Stringer, if he did draw it, might forget it, or overlook it, and he now denies any knowledge of it. Truly I cannot value much what Sir Thomas Stringer has sworn in this Case, he is not consistent with himself, and makes but a very odd Figure in the Cause.

Mr. Stringer. My Lord, I beg your Pardon for interrupting Mr. Baron Powel, but I must vindicate my Father; he never swore a word in this Cause.

Lord Keeper. No, he did not, he was dead before the Cause came into Court. That was a mistake.

Mr. Baron Powel. I am sure there was Oath of what he had said about this Deed.

Mr. Stringer. That, my Lord, you may make what you please of, but he never made any Oath in the Cause.

Mr. Baron Powel. But that which I mention him for, was, that there is Proof apparent that he was advised with about this Deed; and he was the Duke's constant Councel. I do not think, I confess, that Sir William Jones did draw this Deed; it is not insisted upon by the Councel of my Lord of Bath that he did; and any one that considers the Frame of it will think as I do. But I conceive he was advised with upon the Proviso, and the writing in the Margent against the Proviso; I approve of this Proviso, I believe it to be his Hand, though several Persons of good Credit, that were well acquainted with his Hand, have sworn they believe it not to be his Hand. But they might be mistaken, and to me it appears by the comparison of the Records, Deeds and Papers in open Court; for it is plain, according to the various nature of the several things he writ, or set his Hand to, he did write several Hands, and particularly wrote his Name sometimes one way, and sometimes another. And therefore upon comparison of that with other Papers, I do believe it to be his Hand.

The next thing I would mention is this; here are six subscribing Witnesses to the Sealing and Executing of this Deed at Albemarle-House, of which Sir William Jones was one: And one Alleman, that is one of the Witnesses, swears, that when the Duke delivered the Deed to the Earl of Bath, he wished he could have done more for him. It was probable then the Duke believed he had done something for him; and it is very probable too, he knew what he had done for him, when he wished he was

able to have done more. And Mr. Prideaux swears, (tho' he does not exactly fix the Time) that the Duke told him himself, he had settled his Estate upon the Earl of Bath. Then I say, it is hard to believe the Duke was surprized in making this Deed, when his own constant Councel drew it, so able a Councel perused and approved so main a part of it, and was present at the Execution of it, and he should express his Wishes to be able to do more, can he be supposed not to know what he did?

But now let us examine the Evidence and Objection on the other side: They said it doth not appear that this Deed was ever read to the Duke, or by him. It is indeed proved the last Will was read to him by my Lord Ch. Justice Pollexfen, but not at the same time of the executing of it. But however I think the not reading of a Deed to, or by the Party that executes it, is a very slender Objection to make out a Surprize, so as to set it aside. That would shake many a Conveyance; I doubt it would shake many Deeds that were made and executed by the Duke. For tho' he was so cautious as some of their Witnesses say, that he would not execute any Deeds, but what his Councel set their Hands to, yet I do not find that any of them used to be read to him, or he himself read them at the time he sealed them. Therefore it is a dangerous Doctrine to set aside a Deed upon such an Account. Some People will not have leisure to hear Deeds read, or read them themselves.

The not reading a Deed to, or by the Party that executes, a slender Objection to make out a Surprize.

Then they object the mistakes and misrecitals of the Limitations of the Will in the Deed, which refers to the Will, as particularly that of Norton Disney, and some others of less moment: But God forbid that the mistake of a Councel in a Recital in a Deed, should be of that great moment as to set aside the Deed when executed by the Party.

But there is another matter much insisted on by them as an Argument of Surprize; that is, this Deed is pretended to be made in Confirmation of the Will in 75, and yet it varieth from that Will in almost all the Limitations of the Estates, except in some part of that to my Lord of Bath. I confess I have look'd over the Variations, and there are several, but I have this in general to say to it, that I take it this Deed was made for the sake of the Earl of Bath; and that it was for the Earl's better Security, that he bound himself up by so strict a Proviso not to revoke. And if you look into the Deed, it will be found to confirm the Will as to my Lord of Bath, which was the main Point of both Deed and Will. For it sets the Estate given to him upon a firmer foot than it was by the Will which was revocable in its nature: Therefore it must be intended, as no doubt it was, for that very purpose to secure it more to my Lord of Bath, than it was by the Will.

But that which is said to be an Argument of the greatest weight and moment in this matter, that there must be Surprize

in

in the Case, is this; it is hardly to be believed, and almost impossible, that the Duke should send for Mr. Monk out of Holland, by his Will desire the King to bestow upon him the Barony of Potheridge, the ancient Seat of the Family, make a disposition of his Estate by a Will so solemnly prepared and deliberated upon, take care to have three Parts of it; one whereof was to be transmitted to the Dutchess of Newcastle, another Part delivered by himself to Mr. Monk, and the third Part taken with him to Jamaica, and there pulled out and declared to be his Will, and yet intend no real disposition of his Estate by all this. These are Things so dishonourable to the Duke, that they are not easily to be believed of a Man of his Honour and Quality.

I confess this is an Objection of great weight, and carrieth much Presumption with it, but it is Presumption only, which how far it shall conclude against a Verdict, is left to Consideration. But besides, I would put the Case upon a like bottom of Presumption the other way, and then see what we shall make of it. Duke George prevails with K. Charles II. to promise to make the Earl of Bath Duke of Albemarle, upon his failure of Issue Male: Duke Christopher, when he comes of Age, doth make a Settlement of his Estate upon the Earl of Bath upon failure of Issue of his Body. The Earl of Bath is a Person that doth heap Obligations upon both Dukes and their Family, is Assistant to the Duke, both in the Purchase and Sale of Albemarle-House, is continually the chief Person conterned in all his Affairs, nothing almost is done without him. There is no Proof of any Misunderstanding, or Ground for any, between them. Nay, it was the Report in the Family, that if the Duke died without Issue, the Earl of Bath was to have the Estate: He and Sir Walter Clarges are the Duke's near Relations; whereas Mr. Monk, that I said, is not in the Case proved to be at all a-kin to him, and so we must not make him to be related without Proof, but only that the Duke called him Cousin.

Now after all this, that the Duke should make his last Will, and give all this Estate to a Stranger (for so as to any thing appears in Proof) and give nothing to the Earl of Bath, when by the former Settlement he had given him such Hopes of so great a Share; this I think is a very unaccountable thing; and, I confess, I know not how to extricate my self out of the Confusion it causes in me; but I must set the one against the other as to that Objection, and leave the Matter in the dark, as to the Duke's Honour, as I found it; tho', I think, I may give a further Answer to this Objection under the second Head.

But I must speak something more under this Head, for I would omit nothing that I conceive to be material in the Case. There is another thing objected that seems dark in this Case, and that is, what was the meaning of some Parchments that were ingrossed by Thompson, the Summer before the Duke went to Jamaica? The Jury have found that this Deed was

executed in 81: And if then the other side would make use of this, as insinuating that they were the same Deeds, then that is not to be admitted, as being expresly against the Verdict. But to me it seems, that these Deeds in 87 were made upon some Design to have them executed, then perhaps to settle the Estate upon a firmer foot than it was thought before. The Earl of Bath perhaps might be jealous that the Dutchess might prevail upon the Duke to revoke the former Deed in due Form; and therefore these Deeds might be prepared absolutely without any Power of Revocation, and thought he might procure the Duke to seal them so before he went to Jamaica: I say that might be the Intention, tho' what was the Design I cannot really tell.

But admitting that such Writings were prepared with such a Design to get the Duke to execute them, I know not that all this put together will be a sufficient Ground in Equity to set aside the Deed in 81. For all designs in gaining of Deeds will not avoid Deeds actually made: And that is plain from the Case of Bodmin and Roberts, that was one of the Precedents used in this Case, which was in short thus.

Bodmin and *Roberts*'s Case

Mr. Roberts, Son to the late Earl of Radnor, married the only Daughter and Child of Bodmin, who was so passionately fond of his Daughter, that whenever she was in his Presence, he would break out into great Fits of Passion, and weep for Joy to see her. Notwithstanding this great Fondness of his Daughter, one Mr. Wynne took an Opportunity when Mr. Bodmin was under an Arrest, and officiously came to bail him, and insinuates into him, That his Son-in-Law was the Occasion of his being arrested; and thereupon wrought so far upon him as to get him into a private Place, where he was removed out of his Son and Daughter's Knowledge, and where he went by a strange Name: No one of his Friends had any access to him but Wynne himself, and such as he would permit. Mr. Roberts made frequent Application to be admitted to him, but was refused, which was all in Proof. While he was under this Concealment, Wynne tampers with one Barry that had Mr. Bodmin's Will in his Custody, and would have had him suppressed that Will, whereby he gave his Estate to his Daughter. It happens, during his being thus secured, he fell sick, then there is a Will prepared for him to give this Estate away to Wynne from his only Daughter; they get three Witnesses to the execution of it. This Will was never read over to him; this appears in the Proof; but they get him to execute it: And he dies. Hereupon Mr. Roberts exhibits his Bill in this Court to set aside this Will. There was Proof made of all this Matter that I have opened, and this Point of Surprize in obtaining this Will was insisted upon strongly. The Lord Chancellor at the hearing of the Cause was assisted by the Chief Justice Bridgman, the Chief Baron Hales, and Justice Rainsford. But notwithstanding all this Proof, they could not prevail to set aside this Will in this Court; and afterwards when they came into the House of Lords, they were of the same Opinion, and it ended at last in Relief by the Legislative Power, an Act of Parliament.

This now I take to be much stronger for Relief, if any could be, than the Case now in question; and if then upon such apparent Surprize and Practice it could not be set aside in Equity, sure this can't, where there doth appear no Proof at all of any such thing.

Answer to the Second Objection.

2. I come then to consider the Second Head of Argument against this Deed, that it was a Concealed and Forgotten Deed. Now that it was concealed from the Dutchess, and those that were thought her Agents, I agree it so; and it is plain, it was always intended it should be so. But that it was concealed from the Duke, I think has no Ground at all. The thing they would infer it from is the Evidence of Aleman, whose Testimony was read once and again: And he says this Deed, at the time of the execution of it, was delivered to the Earl of Bath; whence they infer he carried it away, and kept it concealed from the Duke, who forgot it: But upon reviewing Aleman's Deposition, it can be understood to mean no other, but only delivered to that effect as a Deed to his use; but not that it was delivered to him for Custody, and carried away by him.

No truly, it seems plain to me from all the Proofs and Circumstances of the Case, that this Deed did remain in the Custody of the Duke of Albemarle; for that Sir Thomas Stringer, a little before the Duke went into Jamaica, doth draw an Abstract of it, in which the very date is mentioned; which could not be drawn from the Paper-draught, where the date is in Blank, but must be from the Deed it self: And how should he have the Deed to do it by, unless it was in the Duke's Custody?

Besides, there is a strong Proof, that the Will of 75 was in the Earl's Custody once; for the Duke sent to him into the Country for it, and the Earl brought it up with him; for it is plain by the wording and framing of the last Will in 75, my Lord Chief Justice Pollexfen had it in his Custody for comparing the one with the other; they run so in the same manner, that it is impossible but he that drew the last, must have the first by him at the same time.

How then came this Deed of 81, and this Will of 75, into the Custody of the Earl of Bath, under the same Cover, with the Seal of the Duke of Albemarle's Coat of Arms on't? For so it was produced first by the Earl of Bath, after the notice of the Duke's death in Jamaica. This cannot be imagined how it should be any otherwise, than as the Earl of Bath says in his Answer, that they were deliver'd so to him by the Duke a little before his going beyond Sea; or else that the Earl of Bath found them so sealed up and covered among the Duke's Writings. And either way it is a mighty strong Proof, that the Deed was all along, till he went to Jamaica, in his own Custody, and not in the Earl of Bath's.

But however it is further objected, that it was a forgotten Deed. Methinks what I last urged is a very good Proof it was not forgotten; but there is yet further Proof of it. Not long before he went abroad, the Duke had some discourse with Mrs. Crofts, who (as she

ſhe ſwears) was told by him, That ſhe ſhould have a good Neighbour at Newhall if he ſhould miſcarry beyond Sea, to wit, my Lord of Bath. And Lane, that is one of the Duke's Servants, doth ſwear, That the Duke told him, that after his death the Earl of Bath would have Newhall. Mr. Crofts ſwears, That upon his Application to know who he ſhould addreſs to in caſe of his Grace's death, the Duke told him, all he could do for him, was to recommend him to the Earl of Bath and Sir Walter Clarges, and ordered him to leave the Keys of his Writings with the Earl of Bath; for he was moſt concern'd in them, in caſe he ſhould do otherwiſe than well.

It is proved, that the uſual diſcourſe of the Family was, That the Earl of Bath would have the Eſtate after the Duke's death, which muſt happen from ſome Expreſſions of the Duke to that purpoſe. And Sir Walter Clarges doth in his Anſwer ſwear, That the Duke told him he had provided for him, as the Earl of Bath knew, which could be only by this Deed. And Mr. Greenvill ſwears in his Anſwer much to the ſame purpoſe. And Mr. Courtney ſwears, That eight or nine Years ago, my Lord of Bath came to him with a Draught of a Settlement to the ſame effect, to adviſe upon: And about three Months before the Duke went to Jamaica, he came again with a Copy of this Settlement, to adviſe, whether a Will would revoke it; and that he gave his Opinion it would not, if the Circumſtances of the Power were not purſued.

But now here the Objection recurs again: Is it poſſible to be believed that the Duke ſhould deliberately make ſo ſolemn a Will, take ſix Months time in the drawing and publiſhing of it, and then execute it in the Preſence of three Witneſſes, if he had not forgot this Deed, but had known all along that there was ſuch a one? If he did know it, and had acquainted the Councel that drew his Will with it, certainly he would have adviſed him, that unleſs he did revoke it, according to the Circumſtances of the Power, all this Care and Solemnity would ſignify nothing.

Truly on the other ſide it is to be conſidered, whether the ſix Months was taken up in deliberation and ſolemn preparation for making of that Will; or, whether that was not an Evidence of a difficulty to prevail upon the Duke to do it at all: For I muſt take the Liberty to ſay, there are Proofs in the Caſe of Importunities uſed to bring him to it. Dr. Benwick did tell the Duke, unleſs he did it, the Dutcheſs would have a Return of her Diſtemper, and be very bad again. It is proved, that when Money is to be paid for the Councels Fees, upon drawing it the Duke was uneaſie, and ſaid, the Dutcheſs might pay it if ſhe would, for it was her Buſineſs. There appears great difficulty afterwards to get him to execute it, that Sir Thomas Stringer importuned him much to it; upon which he grew very much in favour with the Dutcheſs, and there was Enquiry made for a Baronet's Patent to be got for him; all to engage him the more to get this Work done: How doth

doth he bring it about? The Duke was that day to go by Appointment to Sir Robert Clayton's, to meet with my Lord Jefferies, and seal the Deeds of Purchase of Dalby and Broughton. Sir Thomas takes this Will in three Parts, and three Witnesses along with him to Sir Robert's; and after my Lord Jefferies was gone, and the Duke in a fretting discontented Humour, he gets him into a private Room in that House, and then tells him he had brought his Will to him to seal; and the Duke, as Mr. Crofts swears, was unwilling to do it then, and would have put him off; but he pressed the Duke very hard to do it then, and told him he must do it, for he was to be gone the Northern Circuit the next day, and could not be at the Execution of it; upon which he did it, but not till after much urging and sollicitation.

Now I would argue hence, Why should the Duke of Albemarle be uneasie, and disturbed, at his being importuned to execute this Will, after so much Pains and so much Time in the drawing and preparing it? I cannot imagine any Reason why, but that he had not forgotten this Deed, which he never intended to alter, and yet must do something to satisfie some Body's Importunity. He knew he should, in doing it, do a thing that would look very odly one day, and that made him so uneasie, tho' at last he did comply and did it.

But admit this Deed had been at that time forgotten by him, or concealed from him, would this in a Court of Equity be a sufficient Ground to set it aside? I confess of a Purchaser, where one that claims by such a Deed, will stand by and permit the Purchase to go on, and conceal the Deed; as to that Purchase, the Deed will be a fraudulent Deed: But there is nothing of that in this Case, neither such a Purchase nor such a Concealment; and therefore it can signifie nothing here to set aside this Deed, tho' concealed and forgotten.

Answer to the Third Objection.

3. But now I come to a Third Head of Objections: That this Deed is a Deed attendant upon the Will of 1675, and so revocable in its own Nature, as a Will would be, although it contained in it no Power of Revocation. This was very warmly insisted upon by the Counsel of Mr. Monk.

A Revocable Deed attendant upon a Will which is revocable, what.

I confess there is such a thing as a revocable Deed attendant upon a Will, which is revocable; that is, where a Man doth suffer a Common Recovery, and make a Deed subject to his last Will and Testament; such or such a Use may be declared by Indenture under Hand and Seal, as intended at that time of the Recovery. But this Indenture, after it hath declared that Use being founded upon an Assurance that was always subject to Uses declared in his last Will, that Will being always changeable, the Deed may be always changeable: And so is the Case in Dyer 314. b. And the Reason is given in my Lord of Ormond's Case, in Hobart 349. by the Opinion of two Judges against one, because the Foundation, which is his last Will, is always revocable. But such an Indenture to

declare Uses is revocable; but a Feoffment, or a Lease, and Release to uses referring to a Will, or made to Confirm a Will, that that should be revocable, there is no Colour nor any Authority in Law for it.

4. The fourth head is, That there is an implied trust, that the Duke might charge this Estate to the full value; therefore in Equity he might dispose of the Land. This Objection does arise upon a variance supposed between the ingrossed Deed and the Paper-draught: for it should seem that one of the sheets in the Paper-Draught is cut just where this trust is declared, and so they will presume it a general trust which would subject the whole Estate to the Duke's disposal.

Answ. to the fourth Obj.

But as to this matter, it is sworn by Thompson, who ingrossed the Deed, that he ingrossed it by the Paper not Cut, and did ingross it truly according to the draught, and he was believed by the Jury so to have done: Therefore I suppose it was Cut since; and if it were, the question is by whom it was Cut? Truly, I think it not worth the trouble of enquiring after that, but it is most probable it was not Cut by those to whose advantage it would turn to Cut it.

But here doth arise a considerable Objection, by the Will of 75 there are 20000 l. Legacies given, and here is a trust that doth subject this Estate to the legacies of that Will of 75: Shall then the Earl of Bath hold this Estate free and discharged of any legacies by the last Will?

I must confess this was objected on one side, but not debated on the other side, because they that were of Councel for the Earl of Bath, thought it did not concern this question now in debate. That they said might be a question another time between my Lord of Bath, and any persons that may come here to have any legacies given them by the Will of 87. If the personal Estate will not answer, I cannot say positively that they may be payable out of this Trust, tho' I give no opinion in the matter, it not having been debated, and so I have not considered it.

But sure the consequence of that, if it should be so, would not be what this head of Arguments I am upon would infer: That if the Duke might charge the Estate with legacies, therefore he might dispose of it, for he hath bound himself by this Proviso not to dispose of it but under such and such terms.

5. And that brings me to the last head; whether this Will of the Duke of Albemarle, made 1687, and so solemnly done, be a Revocation in Equity, tho' it do not strictly pursue the Circumstances of the Power.

Answ. to the fifth Obj.

All the Circumstances prescribed in a power of Revocation must be observed, to make it good and effectual.

I know not any Rule more clear in our Law-Books than this, that all the circumstances, prescribed and required in a power of Revocation, must be observed to make it a good and effectual Revocation. So is Scroop's case; so is the case of Kibbet and Lee, there is indeed a favourable Judgment to be

giving in expounding powers, but both those Cases still agree that all the Circumstances must be strictly observed.

At Law.

It may be said then, they must be observed in Law, but in a Court of Equity it makes another Case: for when a man hath a power over an Estate, those circumstances are only a guard upon himself that he may not be surprized into a sudden disposition of it: But when deliberately and solemnly he hath done an Act whereby he disposeth of this Estate, but there wants some little ceremony or circumstance, such as the not tendring 12d or the like, a Court of Equity ought to supply such a defect to support his solemn Intention to dispose of it. For plain it is, he is not surprized into this Act, and so the Reason of those Circumstances does fail, and they need not be strictly observed.

Quere, in a Court of Equity.

This way of argument may seem specious in a Court of Equity, I confess; but really I think I am able to give a very plain Answer to it, and that from the nature of powers of Revocation, It is certain no Conveyance at the Common Law could have a power of Revocation annexed to it. As a Feoffment and Livery of Seisin; and that because the Law would not admit such an absurdity, that a man should give an Estate absolutely to another, and yet reserve a power to recall it from him at his pleasure. It is such a repugnancy as the Common Law will not permit. But a man might have done this at Common Law, he might have annexed a Condition to his Feoffment, that if he tendered 12d to the Feoffee or his heirs he might enter upon the Estate. So that the Estate which was devested out of him by the Livery of Seisin, might have been revested by a performance of the condition and Re-entry. So it stood at Common Law.

No Conveyance at Common Law could have a power of Revocation annext.

But a Condition might be annext.

But after the 27th H. 8. for transferring uses into possession, uses become more pliable than conveyances at Common Law, wherein this matter, and then powers of Revocation first came in use and fashion. Not but that it is as repugnant to a Conveyance after the Statute as it was before, for certainly it is repugnant to give an Estate away, and yet have a general power over that Estate. But a power of Revocation was let in as a Condition, and would work as a Condition; but whereas the performance of a Condition at Common Law, would not work a revesting of the Estate, without a Re-entry; now the performance or exetution of the power doth transfer the Estate to the new uses, or revest the Estate in him that had the power without any Re-entry. But still there is now a necessity of the powers being performed, as there was of the conditions being performed at Common Law; for it is the nature of a condition and no more. So is Inglefield's Case, 7 Co. 39.

Power of Revocation first came in use after the Stat. 27 H. 8. c. 10.

There was a voluntary Conveyance made with a power of Revocation; and he who had the power is attainted of Treason. Now all Conditions forfeited to the Crown must be performed,

formed, or no advantage can be taken. This power was in this Case agreed to be forfeited to the Crown; the great difficulty was, whether the King could perform the condition, or whether the performance was not tied strictly to the person that had the power vested in him? That was the great doubt in that case, but there was no question but it was a condition, and the King should have it as a condition forfeited.

And it is likewise agreed in Co. Litt. 238. That it is a condition, and would have been repugnant to be a general power. So that it is not, as they say, a guard only upon a man's self to prevent Surprize, but a Condition. And as a man must perform a condition at Common Law to entitle him to a Re-entry, so he must execute his power, to entitle him to a Revocation. And a Court of Equity can no more let a man in to defeat an Estate upon a power of Revocation, without a due execution of the power, than the Common Law could let a man in to defeat an Estate upon a condition, without performance of the Condition, or than a Court of Equity can think to let a man in to defeat a voluntary Conveyance, without a power of Revocation: for it is all but a condition which must be performed, or no advantage taken of it; and a Court of Equity may do great things, but they cannot alter things, or make them to operate contrary to their essential natures and properties,

Where a Court of Equity may help, where not.

I confess where there is an impediment of executing a power of Revocation, or disability of doing it, a Court of Equity may perhaps interpose. And therefore suppose the Earl of Bath had always had this Deed in his custody from the time of executing it, and the Duke having a mind to revoke it, had sent to the Earl for it; that tho' seeing the circumstances required he might truly pursue them, but the Earl had refused to deliver it, and the Duke not knowing what the power was, had done such Act with a mind to revoke it; I agree it reasonable, that a Court of Equity should interpose to support it. But why is that? because the Earl who was to have the benefit by this Deed, was the impediment why it was not strictly pursued.

And that is a Reason which would prevail at Common Law. I will put you a Case to prove it, Dyer. 354. A. makes a Feoffment to B. with a power of Revocation; if A. at any time during his life pay or cause to be tendred to B. at the Font-stone in the Cathedral at Sarum 20 l. A. tenders the 20 l. at the place in the absence of B. and without any notice to him to attend: this is held to be no Revocation. But saith the Book (as it should seem) if he had sent to B. to be there, or some for him to receive the money at the tender, and B. would neither have come nor sent, it had been a good Revocation. So that where there is an impediment by the default of the party who is to have advantage by the non-performance of the power; and he that hath the power do an Act that expresseth his meaning to revoke, that shall be a good Revocation at Law.

I likewise agree, that in case of disability a Court of Equity may interpose; and I agree therefore, that in case the Duke of Albemarle had taken this Deed over with him to Jamaica, and there had had an intention to revoke it, and had gone as far as he could to do it, had made his Will, and had six Witnesses to it, I believe it would be a good Revocation in Equity, tho' none of the Witnesses were Peers, because of the disability he would be under to have such Witnesses.

And so that defective Executions of powers of Revocations may be helped in Courts of Equity, in the Cases of Purchasers, and Creditors, I take it to be true too. And it is said other particular Cases there may be, wherein a Court of Equity can relieve, tho' the Revocation be not according to the power reserved. And as to that, I confess several Precedents have been cited, and I wonder, considering the nature of them, that more have not been mentioned; but I think there are not above 4 or 5 very much to the purpose, and those I shall take notice of, and trouble you with no more.

Where acceptance makes a breach in form.

The first is the Case of Thorne and Newman; and that Case is no more in short than this. A. Covenants with B. to stand seized to uses with a power of Revocation upon the tender of 12d in the Temple-Hall. A. tenders the 12d to B; who accepts it, but not in the Temple-Hall. The question was, whether this was a good Revocation in Equity? truly I believe it was a good Revocation in Law.

But suppose a man make a Lease reserving a Rent payable at Michaelmas in the Middle-Temple-Hall, and there is a proviso of Re-entry upon non-payment according to the Reservation. The Rent is paid by the Lessee at the day, but not at the place; and the Lessor accepts the Rent, and afterwards Re-enters for breach of the condition. If he have once accepted the Rent, being privy to the Deed, that makes it a good performance of the condition in Law absolutely. So is Co. Litt. 212.

And so it is in case of a Bond to pay money at a day and place certain; the money is paid before the day, and not at the place, and the obligee accepts the money. If he after bring an Action upon this Bond, the Defendant can plead nothing but payment according to the condition: And in Evidence he may give it in proof, that tho' it was not paid at the place and day, yet being received by the Obligee before the day at another place, this is good Evidence at Law of payment according to the condition: And that appeared in the case of Band and Richardson: Moor 267. Anderson 198. Cro. Eliz. 142. And this case of Thorne and Newman I take to be a good performance at Law; where indeed the condition is to be performed to a Stranger that will alter the case, but where it is to one that is privy to the Deed, I take it, it is a good performance at Law, and consequently must be good in Equity.

Another Case cited, was that of Swich and Ashton, and that was thus: One Richard Ashton conveys his Estate in Ules, with a Power reserved in the Conveyance by any Writing under his Hand and Seal, to make Provision for younger children. Being sick, he prepares Instructions under his Hand, in order for Counsel to draw it into form; and it is drawn into form and ingrossed: But before it is sealed, he dieth; and this was held a good performance of this Power in this Court. So here is a defect in the execution of a Power help'd in a Court of Equity.

As to this case, I would observe, first, this is not a case upon a Power of Revocation to divest an Estate, nor a Performance of a condition. But further, here are Instructions prepared, and it went as far towards the Execution of the Power as could be, till an Impediment came in the way by the Act of God in the Death of the Party. Now I agree, where there is an Impediment by the Act of God, or Fraud or Default of the Party, who claims by the Deed, Equity may interpose. But that does no way come up to the case in question.

Then there is the case of Dey and Thwaites, which was lately in this Court. Thwaites makes a Settlement to the use of himself for life and afterwards to such child and children, and for such Estate and Estates as he should by any Writing under his Hand and Seal testified by two credible Witnesses, limit and appoint. He afterwards makes a Will, and has but two Witnesses to it; (so that they did not cite the case right, that said there were not two Witnesses) But two Witnesses are not enough by the Statute to make it a good Will, and thereby he giveth a Rent of 100 l. a Year to such a child, and dies.

Now one great Question was, Whether the Power being to limit Estate or Estates, he might limit a Rent out of those Lands? It was held in Equity he might; and truly I think that he might at Law. There is, I confess, an Opinion against it in the case of Brown and Tayler, where there were three Judges against one. But really I think it is good at Law.

A second Question was, Whether this being void as a Will by the Statute, should be yet a good Declaration of the Trust, and an Execution of the Power? And I think the Court of Equity did very well in decreeing it to be good. For tho' it were not effectual in all Points (as it was intended) as a Will, yet it was a Writing which had all the circumstances required by the Power; and therefore I see no Reason to question whether it were good.

Ward and *Booth*'s Case.

The next case is the case of Ward and Booth; and that stands thus; Sir Thomas Brereton made a Settlement, with a Power of Revocation, by a Writing under Hand and Seal by two Witnesses; and he in a Passion one Day tore off a Label, with the Seal, but afterwards repented, delivered it to the Trustees to be preserved to the Uses; And enquiring whether what he had done amounted to a Revocation? and being advised it did not, he was very well satisfied. This Cause came to be heard before my Lord Nottingham, and adjudged

no Revocation, it appearing there was a continued Intention not to revoke. But I desire to read part of the Ground that Decree went upon, for that justifies what I said, in case where there is a Disability or an Impediment by fraud, this Court may relieve tho' there be a formal Revocation.

There is but one Precedent more that I shall mention, and that I take to be directly for the Earl of Bath. It is the Case of Arundel and Philpot. Mary Philpot being a Widow, seized of Lands, made a Settlement upon the Defendant, with a Power of Revocation upon the tender of a Guinea. She afterwards makes another Settlement upon the Plaintiff, but without any Proof of the tender of the Guinea. Upon a Bill suggesting her Intention to revoke, the Plaintiff could not prevail in this Court to set aside the first Settlement, but was dismist to Law, and ordered to try the Title within a Twelvemonth, whether revoked or not revoked: And there was afterwards a Tryal, and the tender of a Guinea did happen to be proved, and so the Power was well executed at Law. But this Court would not interpose to set it aside as a Revocation in Equity, upon the Intention only, without a Proof of the due Execution.

Arundel and *Philpots*'s Case

Conclusion.

And upon the whole Matter I conclude, that in a Court of Equity there cannot be a Revocation of a Deed, to which a Power to revoke it annexed, but what is pursuant to that Power, unless there be either an Impediment from the Party that claims by the Deed, or a real Disability to execute according to the Circumstances. And I think neither of these are in this Case, nor are any of those Matters alledged of Surprize, Circumvention, Concealment, or the like, any good Grounds to set aside this Deed, if they were proved, which I think there is no Pretence of.

Lord Chief Justice *Treby*.

Chief Justice *Treby*'s Argument.

I Am of the same Opinion with my Brother Powel: I shall state the Case as it stands upon this Deed and Will. The Will was made in 1675, the Deed in 1681; and shall take notice (as I find there was much use made of it on one side) of what the Expressions are in the Will, and somewhat of what Deficiences there were of Expression in this Deed.

The Case.

In 1675 the Duke of Albemarle made his Will; and by that Will he declares, That in respect of my Lord of Bath's being one of his nearest Kindred, and out of Gratitude due to him for many Acts of Friendship and good Offices done to him and his Family, his Will was that he should inherit all the Parts of the Real Estate not therein otherwise disposed of; and therein he desires the King to grant to

the Earl of Bath, and the Iſſue Male of his Body, the Title of Duke of Albemarle; and that his Eldeſt Son might bear the Title of Lord Monk: And this was intended in Truſt to pay all his Debts and certain Legacies in the Will. He therein gives a Legacy of 1000 l. to Henry Monk (not the Father of the Plaintiffs the Monks) who it doth not appear was any ways related to him.

Six Years after, in 1611, this Duke Chriſtopher makes a Deed, and in that Deed recites this Will true as to the Date, but miſtakes it in ſeveral Particulars. This Deed ſettles the main Part of the Eſtate after the Duke and Dutcheſs their Death, without Iſſue by the Duke, upon my Lord of Bath, part of it immediately after his own Death, without Iſſue, other parts upon Sir Walter Clarges, and Mr. Greenville: And it has been obſerved, that almoſt all the Limitations of the Eſtates in the Deed differ from thoſe in the Will, at leaſt in expreſs Terms, if not in very Subſtance.

This Deed alſo ſets forth the Grounds why the Duke made it; and it is to this effect. He doth declare he was ſo unfortunate, that his next Heir at Law was deſcended from a Regicide, and therefore I would obſerve it was not only to confirm the Will, as they would have it, but for preventing ſo diſhonourable a Deſcent of the Eſtate which he owed to the Bounty of the Crown, and for conveying and ſettling, and aſſuring the Lands to the Uſes therein after declared, and confirming and corroborating that Will which he did not intend to revoke, and to prevent any Claim either by the Heir, or any pretended ſurreptitious Will which might be obtained from him by Surprize: Theſe are the Conſiderations and Reaſons expreſſed in the Deed, why he gives this Eſtate away from his Heir at Law.

Both this Deed and Will agree in this for Subſtance, that they limit the main part of the Eſtate to the Earl of Bath, tho' they differ in ſeveral of the Limitations to diverſe Perſons: And as to ſome of the Limitations to the Earl of Bath, they differ too; whether material or no, ſhall be conſidered by and by.

There is in this Deed a Proviſo, which makes the great Queſtion in this Caſe, that the Duke ſhould have Power to revoke any of the Uſes in the Deed, and limit new ones: But this Power is reſtrained by ſeveral Circumſtances; it muſt be by writing under his Hand and Seal, in the Preſence of Six Witneſſes, three whereof to be Peers of this Realm, and a tender of Six Pence to the Truſtees named in the Deed.

Afterwards, in the Year 1687, the Duke makes another Will, and thereby he giveth ſome Parcels of his Land to Mr. Bernard Greenville my Lord of Bath's Brother, Sir Walter Clarges, and others, and makes ſome larger Proviſion for the Dutcheſs for her Life than ſhe had before; but the main Bulk and Reſidue of the Eſtate, is by this Will given to Col. Thomas Monk Father of the Plaintiffs; and he doth likewiſe in that Will make a Petition to the King, that he will be pleaſed to confer a Title of Honour upon him, and make

make him Baron Monk of Potheridge, the Ancient Seat of the Family.

That Will of 75, and the Deed of 81, are subscribed by six Witnesses each, this Will of 87, but by three; and so the Defect of this Will to make it a Revocation is, that there are but three Witnesses, and none of them Peers, and there was no tender of 6 d. to the Trustees.

The Intent of the Cross Bills.

The Intent of the Earl's Bill is, to have an Establishment of this Deed against this last Will; and the Intent of the Dutchess and Mr. Monk's Bill is, to set aside the Deed, and establish this last Will and that upon certain Grounds of Equity, the Deed having obtained a Verdict for it at Law.

This is the General State of the Case, the Particulars will be brought in best under the several Heads that I shall mention: But first I shall take notice, as I go, what Progress this Cause has had since it was first in agitation.

Particular Considerations in the Case.

First, It was insisted, that this Deed was a false Deed, and that was thought fit to be directed to a Tryal at Law; and it was most proper it should be so; for it concerned a great Inheritance and Freehold conveyed by Deed, and a Devise, both Titles at Law, and that was fit to be decided in the proper Judicature for such things, in a Court of Common Law by a Jury. Accordingly, this Tryal was directed in an Ejectment at the King's Bench Bar; and this Court so far aided the Parties to come to the proper Question, as to order there should no Incumbrances stand in the way, or be insisted upon, but anything that obstructed the trouble of the right should be set aside: So that in short the Validity of this Deed was the thing directed to be tryed; it was accordingly tryed, and thereupon a Verdict obtained that the Deed was a good Deed, and the Earl of Bath's Title under it, good at Law; and Judgment was afterwards entered up; and that for the Defendant's part was not exclusive: If there had been any Misdemeanour on the other side, or in the Jury, they might have had redress by applying to this Court for a new Tryal; nay, they may try it again when they please, upon a new Ejectment: But they have acquiesced under it to this Day, that is to say, now for two Years together: So that we must take it for granted (at least this Court is, I conceive, bound by it) that it is a true Deed, and a good Conveyance of the Estate, as much Evidence there is of it as is possible; so strong an Evidence, that we must take it to be a true and a good Deed, and a Deed without Suspicion: Twelve Men, besides the Witnesses to it, have sworn the Validity of it, (that being the sole Question before them) and this must be remembred all along in the Consideration of this Case.

Indeed the Counsel on the other side do seem to speak a little slightly of it, as upon a doubtful Evidence, and at last, that it is true by this Verdict they must admit that this Deed was sealed by the Duke, tho' that was not a little controverted before: But in truth, here is the Right tryed; it was a Deed that was a Conveyance of

the Estate, and now we must take it for granted that the whole of the Deed was tryed and confirmed by the Verdict; so that it is a good Conveyance at Law, and passeth all that the Words can carry. And therefore, in our Consideration of this Case, we must lay aside all the Evidences that was, or was properly to have been given at the Tryal, as to the truth and validity of the Deed: And I, for my part, can allow my self no Consideration of this Deed in speaking to it, but such as are Considerations of Equity, consistent with the Truth of the Deed.

A Deed try'd and confirm'd by a Verdict, passeth all that the Words can carry; and the Validity not to be question'd.

And that is now the only thing that is to be applied unto, what there is in Equity, and Conscience, why this Deed should be set aside when it is allowed to be good in Law,; there is no doubt but there may be good ground, in some Cases in Equity, to set aside that which is good at Law. But the Question is, whether in this Case there be any such or no?

But before I proceed to the Consideration of what has been insisted upon in that kind, I desire to take notice of something about the Will of 87. I am very well satisfied that that Will is well proved: There is my Lord Chief Justice Pollexfen hath proved the Instructions given for the preparing it, and the drawing of it; and there are Three Witnesses that speak to the Publication: And this is confirm'd by the Testimony of Sir Robert Clayton, who transacted the first part of that Affair, to bring the Duke and my Lord Chief Justice together: And I do equally reject all the Evidence on the one side and the other, against the Truth of either the Deed or this Will.

Then this Will would have been a good Disposition of the Lands, if the Law did not hinder; this is, if this Deed did not stand in the way, as a prior disposition, and found good in Law; so the Deed is good, if Equity do not hinder it. Now the grounds of Equity which my Lord Mountague's Counsel insist upon, are I think these: I have made indeed four of them, but in substance I do not differ from my Brother Powel about them, for I comprehend that the Deeds being ancillary, as it was called, and attendant upon the Will, under the head of a Revocation in Equity; I say the Heads of Equity insisted upon, to set aside this Deed, are Four.

The heads of Equity in this Case.

First, Surprize and Circumvention in obtaining of it, and that relates to the Creation of it. 1.

Secondly, Concealment from the Duke, and this by my Lord of Bath, and so he was not informed how his Power was circumstanced, and therefore not able to execute his Power according to the Circumstances, which makes it become a fraudulent Deed, and for that Cause the Plaintiffs shall have relief against it. 2.

Thirdly, There is a Revocation in Equity, tho' it be not in all points such as would be sufficient in Law, yet there is so much done towards it, such a Solemnity in the Action done, and such an Impediment of doing more, as will amount to an equitable Revocation. 3.

The Fourth head is that which was mentioned of the trust in the deed. 4.

As to the first Point of Surprize, it was a Head much laboured by the Case, on the Plaintiffs side, and yet I confess I am still at a Loss, for

Answ. to the first.

for the very Notion of Surprize, for I take it to be either Falshood or Forgery, that is, tho' I take it they would not use the Word, in this Case, Fraud; if that be not the meaning of it, to be something done suddenly and unawares, not with all the Precaution and Deliberation as possibly a Deed may be done.

Surprize, what, and how considered in Law, and Equity.

Here was a Case cited not long ago, in another great Case in this Court, out of the Civil Law, about Surprize, but that was under another Head: That is, A Man was informed by his Kinsman that his Son was dead, and so got him to settle his Estate upon him: This is called in the Civil Law, Surreptio. I know not whether that Word will answer those Gentlemens Notions about this Matter. Now the Civilians define that thus, Surreptio est cum per falsam rei narrationem aliquod extorquetur; when a Man will by false suggestions prevail upon another to do that which otherwise he would not have done.

And I make no doubt but Equity ought to set aside that, but then this is properly called Fraud, and that must be made out, it can never be intended, I find not any such thing pretended to be made out, that my Lord of Bath did use any false Suggestions to the Duke, or Informations at all, for what appears in the Proof; I beg pardon if I mistake or forget any thing of the Proof.

Then here is Matter of a Surprize objected, which must be something that will not avoid this Deed at Law, but will avoid a Deed in Equity, which yet is not direct Fraud or Falshood in the Party, but is to be gathered out of the particular Circumstances of the Case; but what in certain to make of it I confess I cannot tell.

I would repeat the Words that the Plaintiffs Counsel used: They say it is absurdly drawn, it was unduly put upon the Duke, 'twas done without his perusing it; it was contrary to his common Intention, before and after the Sealing of it. It must be admitted that there was Deliberation, and Consideration, and Intention enough proved to make it a good Deed at Law, otherwise there would not have been a Verdict for it: But it should seem there was not enough of these in Equity, and the want of this is what they call Surprize, and that must avoid this Deed in Equity.

But I confess I am not satisfied that there was any Surprize in this Case in any thing: The Duke at the time of making this Deed was under no Force, no Restraint, no False Information, as I observe, no nor any Sollicitation from my Lord of Bath at all: He was in his own House at his full Liberty, he was in very good Company; for I take it for granted, (as I shall insist further by and by) that Sir William Jones was by at the Execution of this Deed, and a Witness to it; the Duke was under no Sickness, no Weakness: And I must take notice of one Proof more which was mentioned, He had not been drinking. but was in very sober Company. This appears to be the Condition in which the Duke was at the sealing of the Deed in question.

But let us consider what are the Particulars of Surprize, that they who oppose this Deed insist upon; I think they are reductible to these Three. There was a Want of Collateral Circumstances that use to attend the Execution of Deeds, made with good Deliberation, and without Surprize: Then there are some Observations made upon the wording of this Deed, which argue a Surprize: And then they say it must be obtained surreptitiously, because it is contrary to his constant Intention and all the Course of his Actings as well before as after that time.

First they say there is a want of Collateral Circumstances that are to attend the Executions of Deeds made with good Deliberation, and without Surprize, and that appears in these Particulars.

First, It doth not appear who drew this Deed: It is certain, they say, that it could not be Sir William Jones, and I think so too: They observe, and with very good Reason, that he saying, I approve of this Proviso, doth prove that he did only concern himself with the Proviso and did apply himself singly to that, and did not manage the Body of the Deed.

Then it doth not appear that the Draught of this Deed was read, or the Deed subsigned, or countersigned by Counsel, as was the Duke's usual Method; nor was there any Counterpart of the Deed: Whereas to the Will of 87, it was carefully drawn and made, and three parts of it prepared, and then there were very great Persons concerned as Trustees in this Deed, and yet several of them knew nothing of it.

To this I must acknowledge, that the Objection is for the most part true; but how far it is an Objection we shall consider further by and by.

First, for the want of Instructions about the drawing this Deed, this is now above ten Years before it comes in question; and such Instructions there might have been, but in length of time lost or laid aside; and when once a Deed is actually made, great Persons, as well as lesser ones, are careless of the Preparations of such Deeds: The Deed binds the Estate, and if that be carefully kept, there may easily be a Negligence as to the rest.

I did observe before, that tho' the particular Limitations in the first Will and this Deed do differ, yet both Deed and Will do agree in Substance to settle the Bulk of the Estate to my Lord of Bath. It is likewise observable, that there is a strong Proof Sir Thomas Stringer drew this Deed, for his Hand is interlin'd in every Sheet of the Draught; and as I do remember his Son writ it. Sir Thomas Stringer was at that time my Lord Duke's Counsel; and I confess there have been reported several things about this Matter from his Youth, which because they are very various and inconsistent, I wish he had been alive, that he might have set all right; but as the Matter now stands here, it has rendred him very doubtful in the Case.

I con-

I confeſs I do believe Sir William Jones had too little Patience (give me leave to ſay ſo) and too much Skill to make ſuch a Deed; I ſpeak as to the Art and Skill of Framing it; therefore I conceive he did not, but Sir Thomas Stringer did.

As to the not reading of the Deed to the Duke, which the Defendants Counſel do object, neither was the Will of 87 read to the Duke at the time of his ſealing and publiſhing it: So far it is true, that after it was ingroſſed and brought to Sir Robert Clayton's, it was not read to the Duke; but the Particulars of it he had been acquainted with at the time of the Drawing, and ſo it might be as to the Deed too, for any thing appears to the contrary.

That there was no Counterpart, and that the Truſtees were not acquainted with it: The Anſwer is, That the Duke did intend it as a Secret, and therefore the leſs notice was to be taken of it; and the Duke intending mainly by it an Advantage to my Lord of Bath, it was thought fit to be concealed, for ſome Reaſons, from the Dutcheſs.

But after all, I know no ſuch Rule in Equity; I am ſure none of the Precedents that I have ſeen come near it; that where there is a Deed for the making of which no Inſtructions are found, no Proof of its being read to the Party at its Execution, no Counterpart, or the Truſtees not acquainted with it, that theſe are ſufficient Grounds to ſet ſuch a Deed aſide in Equity: I do not think any of the Precedents, or all of them together (and I am ſure I have read them all) will amount to prove any ſuch thing.

The ſecond Matter to make out the Surprize, is ſome Conſiderations taken out of the Bowels of the Deed it ſelf, ſeveral Improprieties of Expreſſion, as (in part of Dower) and (in full of Dower) which are not Phraſes that look like the Act of a Lawyer, one well ſkilled in the Property of the Law-Dialect: It doth alſo miſrecite the Will of 75, that is particularly, as to the Lands given to the Dutcheſs, that they are given for Life, when it was only during her Widowhood: The Lands are ſaid to be given to Mr. Greenville as if he were immediate Deviſee, whereas it is a Deviſe to him in Remainder after a Limitation to the Duke in tail.

Improprieties of Expreſſion, and Miſrecitals, are too ſlight Acts to avoid Deeds, which are well proved.

But certainly Improprieties of Expreſſions and Miſrecitals in Deeds, are too ſlight Acts to avoid Deeds ſo made, ſo atteſted, ſo proved, as this Deed in queſtion has been: They are rather indeed Flaws and Objections that go to the manner and form, than the ſubſtance, and ſhew rather want of Art in the Counſel that drew it, than want of Honeſty and Integrity in the Deed it ſelf: Beſides that, a Deviſe to one for her Widowhood, is a Deviſe for Life in one ſenſe, and Common Parlante, tho' it be defeaſable; and a Deviſe to one in Remainder, is a Deviſe to him, tho' not an immediate one.

Another Obſervation out of the Deed it ſelf is, that here are Eſtates limited to the Duke's younger Sons out of Lands which he had no Power to create or carve ſuch Eſtates out of, they being ſettled before upon his Marriage on the Eldeſt Son; and that is true; it is ſo,

as to the Lands called Norton Diſney: But there are other Lands not compriſed in the Settlement, and all the reſt that were new Purchaſed, were in his Power to ſettle as he pleaſed.

But the great Objection out of the Deed is this, That this Deed doth in ſeveral Places declare it ſelf to be made to confirm and corroborate the Will in 75. How comes it then to paſs, that it ſhould differ from it in all the Limitations, except one? And that is in the Draught of my Lord of Bath's own writing; and that part of the Eſtate is by the Deed to come to the Lord of Bath, upon failure of the Duke's Iſſue Male only, ſo that his Daughters are wholly debarred.

To this I ſay, what they object, (that there is rather a Contradiction than a Confirmation of the Will) is true; I am not ſatisfied I aſſure you in that which the Defendants ſay to it, that the Will is mentioned only, as to preventing the Deſcent. It is firſt mention'd there, but I think it goes through, and is repeated more than once; but that which I would obſerve, is this, that this Deed does confirm the Will in the main and ſubſtantial part of it, the ſettling the Bulk of the Eſtate upon my Lord of Bath.

Beſides, the Expreſſion of the Deed is not only for confirming the Will in 75, but alſo to the ſettling of the Lands to the Uſes after declared; and if it do not confirm every Limitation, yet it doth in the ſubſtantial Settlement of the Eſtate.

It was further ſaid, that the only Limitation which agrees with the Will, is that which is in the Draught of my Lord of Bath's Hand-writing, where Lands are limited to my Lord of Bath, after failure of Iſſue Male with Excluſion of the Daughters, which, the Plaintiffs ſay, it can not poſſibly be imagined the Duke ever intended to do. But I muſt mention what Anſwer the Defendants give to it: They ſay the Duke had then 15000 l. a Year: and he makes an Inceſſion to the King to beſtow the Honour of Albemarle upon the Earl of Bath; and that it might not go alone, he limits 3000 l. a Year upon his failing of Iſſue Male; ſo that the Honour ſhould come to the Earl, and there was enough left for Daughtets. Now if their Valuation of the Duke's Eſtate be right (which truly I know not) it is ſome Anſwer why ſome part ſhould be given to the Earl only after the failure of Iſſue Male.

But then I would obſerve too, the Deed by this Obligation doth confirm the Will of 75, and that Will alſo affirms the Deed: If the Will of 75 were once well, as I ſee no Colour to the contrary, then I am ſure all theſe Objections from the Duke's contrary Intentions are all anſwered, that he never intended to give him his Eſtate, for if they admit that the Will was once the true Will of the Duke of Albemarle, then there was an apparent Intention in the Duke of Albemarle to give the Earl of Bath the Bulk of his Eſtate if he died without Iſſue.

Now as to the Variations in the Limitations of the Deed from those in the Will, I think truly it stands indifferent to one side or other. For here was the Distance of six Years between them, and the Duke might alter his Mind; it might be one way one time, and another time another; he might alter his Mind as to his Daughters, he might after so many Years despair of Issue; and so not mind the making any Provision for them, he might change his Mind as to his other Kindred, and therfore might in these Particulars vary from the Will of 75.

But I would still have this observed, that in Substance they do agree; he doth preserve the same Favour and good Intention for my Lord of Bath to give him his Estate as his nearest Kinsman: If then these Limitations in the Deed were pursuant and agreeable to the Duke's then Mind, it is no Matter if there be any such Variations or Alterations from what was in the Will; and that it was agreeable to his Mind then, I shall by and by take notice of some things that occur in this Case, and which seem to satisfie me in it that this was his Intent. For I did observe, that one thing they insisted upon, to shew it was by Surprize, was, that this was contrary to the Intentions of both the Dukes of Albemarle, and the constant Series of Purposes in the Family, and they undertake to give Instances of it.

The Defendants Counsel say, That his Intention was to give his Estate to the Earl of Bath, who was his near Kinsman; to whom he had very great Obligations; that my Lord of Bath was concern'd in that great Action of Restoring the Royal Family, which was the Raising of his own; that he was a constant Friend of Duke George, and his Son's chief Counsellor and Adviser; and that the Family were under great Obligations, is and must be admitted both from what is in the Deed expressed, and what is otherwise proved.

The Plaintiffs Suggestions,

But the Plaintiffs say no, they had no such Intention, neither one or other of them, and particularly Duke Christopher had none, neither before the making of this Deed nor after. Duke George makes his Will in June 1665, wherein he gives all his Real and Personal Estate to his Son, and nothing at all to my Lord of Bath. I did look into the Will, which is very short, and there is nothing given to any body but his Son, that is the whole of the Will; then in the Year 1669 is the Settlement made by Duke George upon his Son's Marriage, and there is nothing settled upon my Lord of Bath, not so much as a remote Remainder. In 73 Duke Christopher makes his Will, and therein gives great Legacies to the Dutchess, but not to the Earl of Bath.

These are Instances before this Will and Deed, but the Answers given them are these, which makes me not satisfied with the Plaintiffs Objections or Proofs of his never intending to give my Lord of Bath his Estate.

First, as I said, Duke George's Will is very short, and takes notice of no body but his Son; and as he gives nothing in it to my Lord of Bath, so neither doth he to any body else, and that very Devise is void, because it was to the Son and Heir, to whom it would without that have descended; and it signifies very little to their purpose, being in the same Year with King Charles's Sign-Manual at his Request to promise the Earl the Dukedom upon failure of Issue Male. Answer'd.

As to the Marriage-Settlement in 1669, there is indeed nothing settled on the Earl of Bath, so much as in Remainder; but in such Settlements Men usually do provide only for the Issue of that Marriage, and so leave the Disposition of Remainders to subsequent Settlements.

As to the Will of Duke Christopher in 1673, at that time they say he was but a Minor of twenty Years of age, and it was only to dispose of his Personal Estate; for as to his Lands, if he had made any Devise of them, it had been void, and the Personal Estate was at that time about 60000 l. But within a Year or two after that, when he came of Age, is the Will of 75 made, and there is a mighty liberal Gift made to my Lord of Bath; and pursuant to his Father's Desire, and King Charles his Privy Seal, doth he make that Request for the Dukedom for my Lord of Bath. And it must be observed, upon all these things, that as there is nothing given to my Lord of Bath in Duke George's Will and Settlement, nor in Duke Christopher's Will in 1673; so nor is there any Lands in either of them, nor in the Will of 1675, or Deed of 81, given to Thomas Monk the Father of the now Plaintiffs; so that that Objection is much stronger against them than against my Lord of Bath.

Now I do not find any Proof of a Provocation or Cause given by my Lord of Bath, to make the Duke totally change from this Intention, to give him the greatest part of his Estate, and put him quite out of his Favour, nor doth it appear he was so; here were several Letters read, there have been Copies of them brought us, and I have looked upon them; against these Letters it has been observed, that there is no notice taken in any of them of this Deed, but there is some of the Will of 1987, while the Duke was in Jamaica about the Death of Colonel Monk.

I confess, I cannot say there is any one Letter that speaks of this Deed, by the Name of a Deed; but there is one or two that have an Aspect upon it, and very near respect unto it, and cannot refer to any thing else, particularly that which was witten relating to my Lord Lansdown, when he was going to travel, and another about his Marriage, wherein he takes notice how much he was concerned in him, even next to his Father himself, as he very well knew; and that he wrote so much about him for Reasons best known to the Earl himself; this seems to

to point at the same Conveyance, and aims at this Deed, to my thinking, directly.

They have made another Objection, that the Duke never intended to leave any part of his Estate to Sir Thomas Clarges, because he was under the Duke's Displeasure, upon account of something he took ill from him, but that receives an easie Answer; what is limited to him is but a Remainder, and that of no great Estate neither; besides that, the Evidence of the Duke's being displeased with Sir Thomas, is but a hearing by a third hand; but I find no displeasure proved at all that was conceived by the Duke against my Lord of Bath to the last: Come we then to the Time of making this Deed, and let us see whether the Duke did really intend what the Words of this Deed do import, and that I think is made evident by Proofs that have not been answered or contradicted; The Deed takes notice of the very great and many Acts of Friendship and Kindness received by him and by his Family from my Lord of Bath; and it is proved, the Duke declared it ought never to be forgotten, nor could he ever make him sufficient amends. It should seem he had procured his Father's Garter for him, when he might have had it himself; he thereupon tells Mr. Prideaux that he was settling or had settled his Estate upon my Lord of Bath, which must be much about the same time that this Deed was made. One of the Witnesses to the Deed says, at the sealing of it he wished he could have done more for him.

But to me, one of the clearest Evidences of the Dukes Intention to do this for my Lord of Bath, and that it was no surprize upon him, is the Presence of Sir William Jones at the Execution of this Deed; for I do take it upon the Proofs, it is most evident that he was then present; and I will tell you what the Evidence of it is: Mr. Vivian says, he was often used as Counsel for the Duke of Albemarle, and principally relyed upon; and this Vivian happens to be one of the surviving Witnesses, and he positively says, Sir William Jones was there, and a Witness to the Deed; so says Mr. Strode, who knew him very well; and the Third says, there was a great Lawyer there, though he doth not pretend to know him, it is Clark: Mr. Hebblethwait says he believes the Name indorsed is Sir William's Hand-writing, and no better Witness could there possibly be for that purpose than he; nor could there be greater Evidence than those Multitudes of Instruments that were produced in Court, whereby to my Apprehension it did appear plainly that the Characters did very well agree.

Now if Sir William Jones was there at the sealing of this Deed, I think I need say no more upon this Point; he was a Gentleman very well known to be both of great Ability and Integrity, and Reputation; and he would never have given up all his Honour and Reputation, and the Quiet of his own Conscience, to make one in a Confederacy of circumventing this Noble Duke, or defrauding any one of his Estate, and therefore believing him

him first to be present which I really do, I cannot but conclude that it was really and bona fide done without Fraud or Surprize. Besides this Evidence, there are several discourses also that have been proved, wherein the Duke hath declared both his intention, and that the thing was done, which sheweth he was not surprized into it, I name Mr. Crofts in particular, who must be admitted to be a good Witness, being one of the three Witnesses to the Will of 1687: And he says the Duke of Albemarle told him the Earl of Bath was to succeed to his Estate.

It is indeed objected upon this head, what needed then all this Privacy be used? why should the Duke conceal it from the Dutchess his Lady, to whom he had been so kind in it? why from the Duke of Newcastle and the other Trustees, Persons of Quality and Honour? They say it could not be for any dissatisfaction the Duke had with his Dutchess, for they always agreed very well together, and they have read the Testimony of my Lord Carmarthen, who says that he never observed a Couple to live better together, or any Woman to carry it better towards a Husband than the Dutchess, and they have produced you some Letters from the Duke to her which shew great Fondness and Affection to her. Objection

Truly in the first place I do not know why any Reason should be expected to be given why he useth Privacy in any Action he doth, sure he may or he may not at his Pleasure; there may be private Circumstances that may induce him (and that with very good Reason) to use more or less Privacy in the Affairs he transacts. But besides this they bring you in Proofs that I cannot but mention, that the Dutchess had conceived a displeasure, though it be not known for what Reason, against the Earl of Bath; that the Duke was uneasie under her Importunities to do what he had no mind to, and that was the Cause of his drinking so hard to divert himself; the Duke was apprehensive she would pursue her displeasure against my Lord, and he would have but an unquiet Life if she came to the Knowledge of this Settlement, at least till she had prevailed with him to alter it, which he resolved not to do. Answer.

Now it may be (I speak it with all the due Respect to my Lord Carmarthen's Evidence) that the publick Carriage might be plausible, especially in the Presence of one of his Quality, and yet there might be some latent displeasure which might break out amongst themselves whenever my Lord of Bath came in competition with those for whom my Lady Dutchess had more Affection, and would make use of her Interest in the Duke about it, and the Councel for the Plaintiffs could very hardly maintain but that the Duke had once an Intention that my Lord of Bath should have his Estate, till, say they, he came to have the Knowledge of one of his own Name whom he designed to prefer and provide for.

If so, then I am sure the first time that any such Change of Mind doth appear, is by this Will of 87; for before that they do not pretend to any thing done for Colonel Monk, and that will serve to answer that Objection that this Deed of 1681 was against the Duke's constant Intent before and at that time.

It is true, he doth call Colonel Monk Cousin in this Will of 1687: Whether he was a-kin to him or no, doth not appear in Proof at all in the Case, but on the contrary it is in Proof that my Lord of Bath is really near a-kin to him; and it was as much his Intent when he made this Deed to keep up his Title and Honour in my Lord of Bath's Family, as can be imagined or conceived.

Objection. As to the Will of 1687, that doth declare his last Intention, and that they say is most probable, that my Lord of Bath should not have the Estate, but Colonel Monk should; for it was a Will made with great deliberation, being five or six Months preparing, great Advice about the drawing of it taken, particular Instructions by himself given, several Copies made and left with several People. On the other side they observe the distance of Time, six Months between the Preparation and Execution, which is not an Argument that he was very forward to do it; but rather an Argument that he was very unwilling to do it, and the very time of executing it was when he was very uneasie about his being forced to execute the Conveyances of Dalby and Broughton to my Lord Jefferies; his Mind was then disturbed; but if he had a real Intention and Purpose to Revoke the Deed, he had an Opportunity to get this Revocation done in their Presence, and afterwards he might easily have got a third Peer.

Answer. The great Objection is, what should the Duke take all this Pains for, and this Care and Thought about the Preparations for this Will, so carefully execute it, deliver the several Parts to several Persons, and all for nothing? I do admit it is a great Objection, and I think there is but one Answer to it, but that is a pretty plain and strong one: Why was all that Care and Thought used about the Will of 1675, and the Deed of 81? did he intend nothing by it then? and if he did then intend something, what Provocation, what Demerit, what was done or left undone by my Lord of Bath to change the Duke's Mind, that whereas before he gave him all his Estate, now he should give him never a Farthing? truly I think it was the Duke's Intent to do this last Act only for his own Ease; he knew the Dutchess had a displeasure to my Lord of Bath, and therefore he himself designing to express his Kindness to my Lord of Bath, would make such a Deed, and put it out of his own Power to alter it upon any slight Attempts, or unless he should have reason to change his mind towards him upon extraordinary Occasions and Circumstances; so by not complying with these extraordinary Terms in the Power, he could preserve his Purpose towards my Lord

of Bath, notwithstanding any Attacks upon him. and yet by such a Will as this he could pacify the Importunities of the Dutchess, who not knowing of the Deed, did acquiesce in a Settlement by Will, so Things might pass easily, and he not being disturbed by any Vickerings or Misunderstandings between the Dutchess and my Lord of Bath.

And truly it appears by what Doctor Benwick saith, that the Duke was to buy his Peace at home by such a Compliance, for he was told the Dutchess would be very bad as to her distemper if her desires were not answered; and in Jamaica there is Proof of a very great Uneasiness the Duke was under, the Chamber was lock'd up, and Persons that came to him were forced to come in at the Windows. I have been long upon this Head of Surprize, because it was so much laboured by the Councel for the Plaintiffs; but after all this I think it is but a short Point; here is a Deed made in 81, fully proved and found to be a good and true Deed by a Verdict at Law, and as such, is a good and sufficient Conveyance of the Land at Law: And that is made to my Lord of Bath pursuant (as to the Ground and Substance of it) to the Will in 75; though all the particular Limitations do not agree; here is no Fraud, no Falsehood proved, no Practice that appears at all upon the Duke to obtain it. But here is the want of a Counterpart and want of notice to the Trustees, and these must be Matters to make out a Surprize to set aside this Deed.

Want of a Counterpart, and want of notice to the Trustees, no Cause to set aside a Deed in Equity.

I confess I am at a very great Loss upon what Ground of Reason that Rule is founded, and am totally to seek for a Precedent to be guided by in the Case, and therefore I cannot but be of Opinion that it cannot be set aside in a Court of Equity upon that Point.

The 2d Head, and Answer.

The next thing is that of Concealment; they say that this Deed was secreted and concealed by my Lord of Bath from the Duke of Albemarle, that he might not know the particular Circumstances of his Power so as to pursue them when he had a purpose to execute it; and this they ground upon a Matter of Fact, which they say is testified by one of the Witnesses to the Deed; that the Deed at the time of the Execution was delivered to the Earl of Bath. and so they say it was kept by him, and the Particulars of the Power were forgot by the Duke, and so he was not informed what he ought to do nor enabled to make a present Revocation.

They say, likewise this Deed was concealed and not discovered upon the Sale of Part of the Estate conveyed in it to my Lord Jefferies, and Leases and Annuities. But that which they insist upon (as I by my Notes take it) is a Passage in my Lord of Bath's Answer to their Bill, that about the Year 1686 my Lord Duke sent to the Earl for his Will, in order to make a new Settlement of his Estate, and this was just before he made the Will of 87.

Now truly I think it may have this short and plain Answer; the Duke, if he had a mind to Revoke this Settlement, had more need

need of the Deed than the Will, he might Revoke the Will without looking into it, by making a Subsequent Will; but he could not Revoke the Deed, because he was by the Proviso circumscribed to the Observance of such and such Circumstances; say they those Circumstances the Duke might be apt enough to forget, and then when he knew the Duke's Purpose to alter the Settlement of his Estate, my Lord of Bath should have been so ingenious as to have sent the Deed, or have acquainted him with the Purport of it, and should have considered that the Duke did mostly need that to effect his Purpose, more than the Will to Revoke, that he might observe the Statutes of Frauds and Perjuries, required by three Witnesses to make a good disposition of Lands by a Will, and without much ado that might be complied with: But yet all the while this Power not being observed, all his Councel, by subtile Advice, told him would signify nothing, therefore he would not discover that, and not doing it, it must be a fraudulent Concealment in him sufficient to set aside this Deed.

They say, it is no Objection, that this was not a fraudulent Conveyance in its Creation, for every Man shall be relieved against that which being by Fraud concealed from him, he could not make such reasonable Provision against as, if he had known of it, he might have done. Truly I do think this is the best Ground of Equity that has as yet been offered in this Case, and were it not grounded upon Facts, which in truth upon the Proofs are quite otherwise, I should think it were a good Ground for Relief, for wheresoever a Man doth endeavour to inform himself of the Circumstances of his own Power and Condition in order to Revoke such a Settlement, where he has a Power so to do, and is hindered from coming at the knowledge of them, and especially by that Person whose Interest is to prevent a Revocation, he ought to be Relieved in such Case; for it is against good Conscience that any Man should profit by any such subtile sinister Practices; therefore I say the Objection were good, if the Fact were true?

Where a man endeavours to inform himself of his own Power in order to revoke a Settlement, and is hindered from coming to the knowledge thereof, he ought to be reliev'd.

But alas it is founded in this Case upon Presumption meerly: It doth not appear that the Duke was desirous or needed to be informed at all in the Matter, or that he did really intend a Revocation, we do not hear any Proof that he did ask or speak to any Councel about it; nor is it true in Fact that the Duke should expect the Deed out of my Lord of Bath's Hands, nor indeed could he expect any such thing, for I take it, it stands plain in Proof thus:

My Lord of Bath says in his Answer, that the Deed was delivered to, and kept by the Duke; they say that Answer of his, being a Defendant, is not to be regarded, for it is replied to generally, and so the Facts not acknowledged any further than they are proved. But to that I say, the Plaintiff must prove that this

this Deed was in my Lord of Bath's Hands; they say Aleman proves it, who says it was deliver'd into the Earl's Hands: This was looked upon as so material a Point in this Case, that the Deposition was called for to be reviewed; and upon reading it again, it was plain it must be understood of the Delivery of the Deed only to execute it and make it a good Deed, not a delivery into his Custody.

May, there is a farther strong Evidence, that it was in my Lord Duke's Hands, and not in my Lord Bath's; for Sir Tho. Stringer doth a little before the Duke went beyond Sea, make an Abstract of it, and delivers it to his Man to make a Copy of; and then after the Duke's death both Deed and Will were produced under one Cover, (but it is plain the Will was delivered to the Duke.) This answers it, and agreeth to what my Lord of Bath saith in his Answer, that they were both delivered to him by the Duke a little before his going to Jamaica, under that Cover, and sealed with the Duke's own Seal, and so they are found. And truly if it were but doubtful, whether it were in the one hand or the other, we must not determine that it was in my Lord of Bath's Hands, or convict him or any Man of Fraud where the Evidence is doubtful, it ought to be proved, and plainly proved; for Fraud is a thing odious, and never to be intended or presumed.

Fraud is a thing odious, and never to be intended, or presumed, but plainly proved.

But the Truth was, this Deed was concealed not from the Duke, but from the Dutchess, that she or her Councel should not get at it to procure a Revocation.

As for the Case of Charles Clare that was mentioned, it doth not in any sort come up to this Case; he had lent Money upon a Statute, afterwards Money is lent upon a Mortgage of the Lands liable to that Statute; he ingrosseth the Mortgage, and never discovereth the Statute, the Lands were not worth more than the Mortgage-Money; and by reason of this Concealment, it was adjudged Fraud in him, and he should have no Benefit of his Statute against the Mortgagee. Here was a Knowledge proved in the Case, which is not in my Lord of Bath's, that the Duke would revoke; and yet I must needs say, and I appeal to those Gentlemen that usually attend at this Bar, whether they did not think it a hard Case.

Clare's Case.

And as to the Case of Raw and Pott, besides that it was a Case between a Younger and an Elder Brother, and so might have a better Ground or Handle for Equity, yet I think it was justly decreed, because the Party knew it and concealed it on purpose, and encouraged the thing: For when he was asked, why he did not discover it? then he answered, If he had, then there would have been a Fine levied, and a Recovery suffered, and then he knew all would have been well enough; but there is no such Matter as Knowledge, or the like, here.

The next Head of Objections is that of a Revocation in Equity; and for that the first thing insisted upon is this; they would have the Deed of 81 to be depending upon the Will of 75, it was ancillary, it leaned upon it, and therefore this Will of 87 revoking

The 3d Head and Answer.

A Feoffment depending on a Will may be revoked by revoking the Will, tho' Livery of Seisin was made.

the Will of 75, revokes likewise the Deed of 81? And for this they did cite two Cases out of Dyer, the first is fol. 49. 6. A Man makes a Feoffment to perform his last Will, and this Will is annexed to the Charter of Feoffment, and a Livery of Seisin is made; accordingly it was adjudged that he might alter and revoke that Will, tho' it took effect by the Livery; for that doth not alter the Nature of a Will, which is always revocable by the last Will; But doth that revoke the Deed too? No certainly, the Deed stood good; and there is nothing to the contrary appears in that Book.

The other Case is Dyer 314. 6. A Man by Deed indented declares, That whereas he had suffered a Common Recovery, to the intent to perform his Will, touching the Disposition of his Lands, he wills so and so; and whether he could, during his Life, alter the Uses in this Indenture, was the Question; and it is held he might: For this Indenture is Quasi a Will which is changeable: I will go further than that, I say it was a Will, or it was nothing; for tho' it were in Form of an Indenture between several Parties, yet when he says, he wills so and so, after he had recited a Power to declare by Will, this must be taken for a Will, or it is no Execution of the Power; for when a Man suffers a Recovery, or makes a Conveyance to me by his last Will, he hath two Interests in it; he may dispose of it as Owner, or by way of Direction: If he will dispose of it by way of Direction, as this was, he must follow the Method prescribed, and that must be by Will; and so this must be a Will, or no Execution of his Power. But what is that to this Purpose, that a Will, which a Deed is made to confirm, being revoked, that shall revoke the Deed too? Sure that is no Consequence, nor hath any Ground upon this Case.

The like also of Uses limited in an Indenture, to the Intent to perform his Will.

But then, say they, here is a Revocation, and that a Revocation in Equity; for though it be a good Deed in Law, yet there is such a contrary Disposition by this Will, as must revoke it, being revocable according to the Power. Indeed here is not the Number of Witnesses required, nor the Quality, nor a Tender of the Money, and Powers of Revocation; for it is natural Equity, that he who is Owner of an Estate, should dispose of it as he pleaseth. But there is another Rule of Law that is as certain as any other, that all Circumstances must be observed, or the Power not well executed; and that is Scroop's Case, and other Cases that have been mentioned: And though the Law will go as far as it can to expound the Circumstances, as a Performance, yet a Performance is necessary.

In Revocations all Circumstances must be observed, or the Power not well executed.

Yet it seems where there is a deliberate Intent to make a new Settlement, and a Man goes as far as he can, Equity shall supply

The Foundation for this Revocation in Equity, which the Plaintiffs go upon, is this; where there is a deliberate Intent to make a new Settlement of the Estate, and a Man goeth as far as he can to make it, there Equity shall supply any Defect.

First, I must deny that in this Case the Duke of Albemarle hath done all that he could do; for he thought six Witnesses necessary to the Will of 1675, and six Witnesses to the Deed of 81, and so provides in this Power for Revocation, besides other Circumstances, and here are only three Witnesses to this last Will. Neither

Neither is this a proper Settlement of a Family, for it doth not appear that Mr. Monk, who is mainly taken care of in this last Will, was any Kin to the Family at all: May it should seem the Duke was not spontaneous about it, for he would have the Dutchess pay the Councels Fees as for her Business, when he came to execute it, it was not a Place that he came to for that Purpose, but upon quite another Affair; he would have put it off to another time; he would have avoided it, it was done in a hurry, and before Witnesses prepared for that very Occasion, and brought from Newcastle-House; and therefore it is not so much his Intent and firm last Purpose.

On the other hand they oppose this Argument thus; That the Duke did at the same time write to my Lord of Bath that his Purposes towards him were unalterable; and what his Meaning in that should be, unless his Purpose not to revoke this Deed and Settlement, truly I cannot tell: He left the Keys of all his Evidences with him when he went away; Crofts was ordered to deliver them to the Earl as chiefly concerned, if he should miscarry; he trusts him with the chief Management of his Affairs, directs him to be advised with upon all Occasions, as he used to do himself before, and so is the same still towards him in all Respects as ever he was.

I do not find in any of the Plaintiffs Proofs that there is any Cause shewn for altering this Mind of my Lord Duke's, if he had not himself declared it so to be unalterable; there was no Provocation on the one side, or increase of Merit on the other side, why he should change from his Kindness so grounded towards the nearest Relation of his Blood, to entertain a Stranger to whom he had never a Thought of giving any thing before; it is hard to think that my Lord of Bath, Sir Walter Clarges, Mr. Greenville, and even the Dutchess her self, should continue the same, and the Duke should not; I find no Evidence of it, nor can tell any Reason for it, and without Reason I cannot be induced to give my Opinion against a Deed really, deliberately, intentionally made, upon only the single Act of this Will, testifying so great and total a Change; surely if any such thing had been meant, it was strange he should take no notice of this solemn Will and Deed made before, and ask Advice whether it were not fit to revoke or look into it.

To my thinking, the Duke hath in effect declared, that this Will in 1687 should be taken for a Will as obtained by Surprize, for he binds himself by this Proviso only to revoke in such and such a way to prevent Surprize: We then find there a Will that wants these Circumstances required in the Proviso, and then we must take it to be what he intended to fence himself against; and nothing doth reconcile the Duke to himself in this Matter, but that he was apprehensive he should be drawn to do something that was against his Mind, and therefore he doth fence himself with this Proviso against all such Attempts.

The Will and the Deed do both provide largely for the Dutchess, but whether the Will doth it so liberally as the Deed doth, I cannot tell; they did talk as if there was 3 or 4000 l. difference: I cannot tell what as to the Value it may be; but I am sure in this Will there is no Provision made for my Lord of Bath at all, and there is none for Mr. Monk in the Deed, or any other thing before this last Will.

I must crave Leave to differ from the Council for the Plaintiff in what they take to be a Ground for a Revocation in Equity, that the Duke had forgotten this Deed; I am not satisfy'd that upon that Ground only this Court should relieve against it: And my Reason is this; Suppose his Intention to revoke do appear, it ought to be in such a manner as the Law requires, and pursuing such Circumstances as he has put upon himself, because here is a voluntary Conveyance on both sides; and where there are two voluntary Conveyances, he that hath the Advantage at Law ought to keep it. And so the Resolution was in * Fry and Porter's Case: And I take it to be the standing Rule in Equity; For what shall turn the Scale? Shall the Defendant urge any thing of Merit? That cannot be in this Case, but in the Eye of the Law they are both equal under the Consideration of the Court, and in pari gradu; and indeed if it should be otherwise, what would become of Circumstances in Powers of Revocation, by which Men shackle and circumscribe themselves with very good Reason at their Creation, if the last Will alone shall set aside all?

Where there are two voluntary Conveyances, he that hath the Advantage at Law, ought to keep it.
* Cases in Chancery, 1 Part, 138. and 1 *Ventris*, 199.

Objection. It is Objected, That it was always the Duke's solemn Intent to prevent the dishonourable Descent of his Estate upon his right Heir at Law, who sprung from a Regicide, and to prevent a Surprize by a sudden surreptitious Will; and both these Ends are attained by the solemn deliberate Preparation for his Will, and the Disposition of his Estate to Mr. Monk, and it is substantially and therefore equitably performed, tho' not strictly legally.

Answer. I think there was a further End in this Deed, and that was to settle his Estate upon a Person of Honour nearly related to him in Blood; and this Court cannot take it from him without reflecting on this Settlement, and upon him that made it, and upon him for whom it was made; no, nor can it be done, as I take it, without performing the Circumstances required and prescribed for that Purpose in the Proviso, without which I think this Court ought not to determine that the Intent is performed, or that his Mind is changed. And if we shall depart from these Limits, I cannot tell where we shall stop. I can set this as a good Limit; here is a voluntary Conveyance on the one side, and a voluntary Conveyance on the other side; the latter Conveyance must make it out, that the Circumstances requisite are performed, and if not, I think the Law must decide it; and there hath been nothing made out, by which, as I conceive, there can be any Advance given in a Court of Equity to determine it otherwise than the Law will.

I shall speak but very little to the other Head; It is objected and asked, whether there should be no Relief in any Case where there is a Defect in the Execution of the Power. I think that would be very hard on the other side, and it would be convenient Relief should be given in these Cases. Fourth Head.

First, for a Purchaser, I speak not now of a Purchaser for a valuable Consideration without Notice, for that is helped already by the Statute, and so where there is any Fraud, or the Party is guilty of any Deceit or Falsehood, whereby a Man is prevented from executing his Power, though he never so much intended or desired it. In what Cases a defect in the execution of the Power may be reliev'd.

But there is no such thing here, and the Plaintiffs Counsel were wiser Men than down-right to call this Fraud, only they style it Surprize and Circumvention.

I think also it may be fit for this Court to give Relief where there is a foreign Consideration, as Consideration for Payment of Debts, or providing for younger Children; As where a Man makes a Conveyance or makes a Will, and chargeth his Lands over, when he has such a Power, for the Payment of his Debts, and the Circumstances of the Power are not exactly observed, there shall be Relief in Equity for the sake of the matter; Payment of Debts is a most conscientious Thing, and fit for a Court of Conscience to take care of, and see performed; And providing for Children is a thing of the same Nature, they are looked upon as Creditors; and I think this is reasonable, and the Precedents have all gone that way. Payment of Debts a most conscientious thing.

The Statute of 32 Hen. 8. which gives a man power to devise Lands by Will in writing, recites it as reasonable, that a man should dispose of his Estate to pay his Debts, and provide for his Children, but goeth no further; those were wise and prudent Considerations upon which the Law did enlarge a Man's Power of disposing of his Estate; but there is nothing of either of these in this Case; every one will say he is not a Man of good Conscience that will not pay his Debts, or provide for his Children; but will any Man say that my Lord Duke had not been a Man of good Conscience if he had not given this Estate to Mr. Monk or to my Lord of Bath either? He might lawfully and conscientiously give it to the one or the other; but there is no Consideration of Equity appearing why he should be obliged to it, or to take it from the one to give it to the other, he might use his Liberty according to Circumstances and his own Power. 32 H. 8. c. 1. Sect. 1.

Another Ground of Relief in Equity is Accident, or an Impossibility of complying with the Circumstances when he hath a plain Intention to do it, I agree it is so; but then he might do all that he can, as the Case that was put, of a Man's being obliged to pay or tender Money at such a Place, and he falls sick, or lame, or Bedridden, that he cannot go thither, and it is tendered by another by his Order, or at another Place; this being the Act of God, I think it would be a good Performance of the Condition, and that I think is the best Answer that can be given for the Decree in Popham's Case.

But now here when the Duke was informed of his Power, or might have been, and neglected all, and performed nothing, shall this Court supply these Defects, and want of performance? Sure they may as well supply all the rest; that there should be no Hand, no Seal, and for ought I know, no Will or Deed, but only a Parole Declaration.

There is one thing that I should properly mention last under this Head; they object it is not said, that it should be in the presence of six Witnesses altogether: Now it was in the presence of three Witnesses here in England, and three more in Jamaica; and so here are six Witnesses, though not all at once, and there was no Peer to be had as a Witness in Jamaica; so there is an Accident rendering it impossible to have any such, and therefore Equity will relieve against such an Impossibility.

I do agree, if the Duke had gone about directly to make and publish his Will in Jamaica, with an Intention declared to Revoke this Deed, and had had six Witnesses to this his Act and plain Intention, there being no Peer to be had there, it should have been a good Revocation; as in the Case mentioned by the Council of Kibbett and Lee, in my Lord Hobart 312. Indeed if the Power were limited to be executed in the presence of three Subsidy-men, it is said in the Book that they must be averred to be Subsidy-men, but yet I take it now that old way of Subsidies is out of use; three substantial Men that would have been Subsidy-men: If that were the present way of Taxing, it would be enough, for none such would be had, nor could there be any Peer in this Case that is put.

But to consider the Case and Proofs as to Jamaica, what it amounts to: I would fain know how it appears, that it was the same Will that he executed at Sir Robert Clayton's: The Duke only said, Doctor, this is my Will; perhaps it was the same, perhaps it was not: But how comes his Writing, his Hand and Sealing in the presence of three Witnesses, and declaring it after to be his Will (to make the most of it) in the presence of three more, to be an Execution in the presence of six Witnesses; but beyond all this, here is no Proof that he did intend to publish this as his Will, it is only a private Saying of his on the by, when he saw it among other Papers which then he shewed Dr. Sloan; he was not then solemnly making his Will, or executing his Power; he doth not so much as bid them take notice that he declared that to be his Will, or any thing to make them remember it afterwards: So that I take it, it signifies nothing as to this Matter.

Cases and Precedents answered.

I would trouble your Lordship no longer, for I have been long enough already; I am loth to meddle with the Cases and Precedents, because that may take up too much of your Time; but because the Precedents have been brought me, I must say something to them, to shew that I have read them; I will therefore open some of them, such as I think come nearest the Case.

They say, the Common Law goeth as far in relieving upon Cases of Powers of Revocations, as appears by Kibbet and Lee's Case, that I mentioned but now; where a Will is declared to be a writing; so the Case of Thorne and Newman's Payment in another Place than that required in the Proviso: In that Precedent it is recited, that the Indorsement on the Back was, that the Money was paid according to the Proviso, and no notice taken of the Place; for upon the very reading of the Indorsement, the Plaintiff was forced to be Non suit; and afterwards that Matter was disclosed in Equity, that it was in another place than the place in the Proviso, but yet no Relief against his own Acceptance, who was the Party privy. Hob. 312.

The next Case is the Case of Guy and Dormer; A Man sells his Estate, with a Power to Revoke by any writing, in express words.

Now here they did not help the want of a Performance, but the Judgment was, the Performance was real; besides I cannot allow that to be any Argument, that if the Law has gone as far as it may, Equity shall go further: To me the Argument runs quite contrary: Equity shall carry it no further, for Equity should follow the Law. Equity follows the Law.

There were several Precedents cited by the Plaintiff's Counsel; but I confess, upon consideration of them, very few do come up to the Case in question; I shall take them as near as I can in order of time.

The first is that of Prince and Green, 40 Eliz. There was a Power to make Leases intended to be reserved in a Conveyance by a Covenant to stand seized to Uses, and a Lease is made accordingly, as a Provision for a younger Son. This Power was not long after Mildmay's Case, and the Case in Roll's Abr. 1 Part. Tit. Chancery 378. But because, says the Order, neither the Party nor his Council did then know but such Power was warranted by Law, though by late Judgments they were found to be void, and so it was impossible to them to prevent it, the Court did Relieve in this Case to make good the Lease; and it is there said that the elder Brother, who would avoid the Lease, was an unreasonable Man, and this was a Provision for a younger Child, which is not our Case, neither the Council's mistake of the Law, nor a Provision for a younger Child.

The next is the 44 Eliz the Case of Ferters and Tanner; A Man deviseth Annuities out of Lands to his Half-Sisters, and gives the Land to his Half-Brother, who makes over his Estate to prevent their being seised of the Rent in order to distrein, and the Court, after some time, and upon sight of a Precedent, did Relieve the Devisees.

Here I would observe how difficult it was even for this Court to do that, for they say, the Heir that had the Land, did promise the Devisor before his Death to perform the Will, and that was a Deceit, otherwise the Devisor might before his Death have done it by a Conveyance, or granted the Land with a Condition to do such an Act, or permit such a thing; and that he did consent afterwards before the Master of Chancery to do it, I will not say but that this Court might

might have declared this Payment without these Circumstances, nor that these might not make the Case somewhat better; indeed in the short Print of the Case in Moor 626. pl. 859. there is no Reason but the Resolution only.

The next Case is in the Year 1655, the Case of Hamilton and Maxwell in this Court, which in short was upon very good Reason, because it was a Provision for a younger Daughter, and that is agreed on all hands to be a good Ground for Equity, and he declared that his elder Daughter was otherwise sufficiently provided for.

Another Case is that of Bowman and Yates, and that is about a Covenant for levying a Fine for raising a Rent out of Lands, which was indeed defective at Law, but decreed in Equity to be paid and satisfied; but if it be looked into, I think it will not appear very pertinent to this Case, it being only to support the Intention of an Agreement upon Marriage: This was 12 Car. II.

Cases in Chancery, 1 Part, 80.

The next is the Case of Wallis and Grimes, 19 Car. II. which was this; Sir Thomas Grimes the Grandfather makes a Conveyance in Trust for payment of 500l. to younger Children, the Heir makes a Mortgage without notice, and this Trust is endeavoured to be set up against the Mortgagee, but the Court would not permit it; but comes not near our Case, for a Mortgagee is in nature of a Purchaser.

V. Cases in Chancery, 1 Part, 176.

Then 20 Car. II. was Pitt and Pelham's Case in the House of Lords. There this Court did relieve, because it was a plain Intent the Land should be sold, and there was only a want of naming the Person that should sell, and the Law would help that: He that hath the Land shall do that Office, and he that was next door to a Provision for Children, it being for Nephews.

Cases in Chancery, 1 Part, 263.

For the Case of Smith and Ashton, besides the Answer my Brother Powel gave to it, it has also this flat Answer to be given, that it was a Provision for Children; that was the next Case in point of Time.

Then comes the Case of Brisco and Peters, 28 Car. II. I have, as carefully as I can, perused that Case, but cannot really observe how it is made use of in our Case, and it is very much to be considered that it is no Rule between two voluntary Conveyances how far a voluntary Conveyance shall be fraudulent against a Purchaser.

The next Case is that of Thwaytes and Dey, which hath also had a full Answer given to it already: It was doubted, whether there was a Seal to it; but the Court seemed satisfied with that; and all the remaining Question was, whether a Man making a Conveyance and reserving a Power to make any other Estate, could charge that Land with a Rent for a younger Child, and the Court held he might, and I think it a good Decree.

These are the Precedents that are made on the Plaintiff's side, there are but few brought for the Defendant's Part, but two that I think are very material; the one is that of Ward and Booth, which hath been opened and applied by my Brother Powel; but I would observe from what he quoted out of the Decretal Order in that Case, that it doth very extraordinarily declare the Limits of this Court's Proceedings,

in

in such Cases as these. Here was not a formal Revocation, but a clear and express Intention to Revoke, that doth not appear in the present Case; there should be, I agree, Relief in such Circumstances, if there were Fraud in the Party, if there had been any Accident to render it impossible to execute the Power in all Formality; but here is neither Fraud nor Accident, and therefore, by the Reasons and Rules in that Case, there can be no Relief in this Case.

The other is Arundel and Philpot's Case, and that is so very express an Authority for this Court's leaving the Determination to Law, that nothing can be more: There they say, where it is a voluntary Conveyance against a voluntary Conveyance, you must try and decide the Matter at Law; and it did fall out in that Case, that there was no need of a Court of Equity to interpose, for upon the Tryal it did fall out to be proved, that there was a due and legal Execution of the Power, that there was a Tender of the Guinea.

A Voluntary Conveyance against a Voluntary Conveyance to be try'd at Law.

As to the matter of the General Trust, I need say no more than this, whether that would avail any thing upon a Controversy between the Legatees and my Lord of Bath, I cannot tell; but I am sure it is not at all as this Case now stands. Yet methinks as to a General Trust, that it cannot be; for that were to make the Duke use all this Solemnity in making this Settlement to no purpose, and would render this Power of Revocation very useless and false: The use of this Power was because he had put the Estate out of him both in Law and Equity; and so there could be no General Trust or Means to bring it back again without a due Execution of the Power.

There are but two or three small Objections more that I shall but mention, and conclude.

First, They say several Grants will be avoided if there be no Relief against this Deed, that is, some Leases, some small Annuities to Servants, and a Grant of 100 l. to the Duke's natural Son; this is all. Now whether it is not reasonable to imagine, the Duke thought that the trusting the Earl with so great a part of his Estate, he would have more Honour and Respect for him than to dispute such trivial Matters; and for any Leases or Contracts, they come within the Rule of Purchases, and so the Consideration would preserve them.

Objection

Answer.

Then they say, here is no Monument for the Duke, a Person of so great Quality; but that may be made good out of the Personal Estate; I am sure it is no Objection in Point of Law.

Objection Answer.

But the last thing they urge, is, If there be no Relief in this Case, you put the greatest Indignity and Reproach upon the Duke that can be imaginable, that he should call Mr. Monk Cousin, send for him out of Holland, to leave his Will with him, in the Will give him so great a Share of his Estate, desire the King to make him a Baron, and appoint his Son to be educated as one that was to make no small Figure in the World; that he should send for my Lord Chief Justice Pollexfen to draw his Will, make three Parts of it, deliver one to the Dutchess of Newcastle, another to Colonel Monk,

Objection

and carry a third with him to Jamaica, and there take publick Notice of it, and alterall this Expectation raised in Mr. Monk of a Fortune, run him into the Charges of an expensive, but what he knew would be a fruitless, Suit: This, say they, is an inconceivable Dishonour to the Duke, to be represented as one that would prevaricate so with the King and the World, and play with the Misfortunes of his Kinsman, and the rather, because the Duke was a plain sincere-hearted Man, and in all this did but pursue his real Intentions of Kindness to Mr. Monk and his Children.

Answer. Truly, methinks they have just as much to lay on the other side: What shall those many Declarations of Kindness to the Earl before this Deed, in this Deed, and after this Deed by Letters, and other things, signifying his Care of my Lord Lansdown as one he was most concerned for next to my Lord of Bath himself, his petitioning the King to confer on him the Title of Duke of Albemarle in case of his failing of Issue Male, and all this to signify nothing; besides the known Kindred, the apparent Obligations and Merit of my Lord of Bath: Sure if all this be consider'd, the Duke's Honour is as much concerned on this side as on the other, to approve himself sincere in all these solemn Transactions! Would he own him as his nearest Kinsman, and the most deserving of his Blood, and all the while have a secret Purpose in the last Act of his Life to make a Will, by which he would set aside all he had professed to do for him, and by leaving this Deed and Will with him, leave only so much in his Hands as should put him into a chargeable Suit for nothing? Therefore, upon the whole, I think there is greater Reason to conclude that the Duke did not certainly mean to do this last Act, as what he would have to stand against so much formerly done the other way: But I rather think the Evidence is strong to perswade any one that the making of this last Will was to satisfy another Purpose, and make his own Condition easy at Home.

But my Opinion, as to the Judicial Part of this Case, which I thus happen to be of, is the stronger in me, because of the Authority of two Cases, which I take to be express in Point, and those are the Cases of Wynne and Roberts, and Fry and Porter.

Wynne and *Roberts*'s Case, *Antea.*

In the Case of Wynne and Roberts, there was Proof of a very great Surprize upon the Man, whereby he was induced to make a Will, and to disinherit his Child, of whom he was before very fond, and who was married into a very Honourable Family, and to break a Settlement solemnly made before: All this Matter was charged in the Bill, and proved: But notwithstanding this, the Court declared they would give no Relief; but if they could expect any, they must go to Law, and at last it was ended only by a Bill in Parliament. The Court said, Try it at Law, a Will or no Will, and do not expect the Chancery should make Mens Wills, or set them aside, if legally made, especially then not upon bare Conjectures and Suppositions concerning a Man's Intentions, to relieve against a solemn Act and Title found at Law.

In Fry and Porter's Case, one of the great Reasons why the Court denied Relief there, was, that it was a Controversy between two voluntary Conveyances; and there that side that had the Advantage at Law, ought to keep it; and it was without Precedent to Relieve in any such Case. Cases in Chancery, 1 Part, 138. 1 Vent, 199.

So I say in this Case, we have no Precedent of Relief in any such as this now before us; we must not say this Court is unlimited, unbounded, by any Rules; it is no doubt limited by Precedents and Practices of former Times, and it is dangerous to extend its Authority further: If therefore I err in my Opinion in this Case, I err with these Precedents on my side; and because I have never a one to guide me the other way, the Defendants are in Possession of a Verdict, Judgment and Title at Law, and I can see no Ground of Equity to Relieve the Plaintiffs against them. Chancery not unlimited and unbounded by any Rules. Conclusion.

Then it being very late, the Court put off the delivering the Lord Chief Justice Holt's Opinion, and the Lord Keeper's Decree till another Day.

Die

Die Veneris 23 Decembris, 1693. In the Court of *Chancery*, in *Westminster-Hall*, Comes *Mountague*, & alii versus Comitem *Bathoniensem* & alios; & econtra.

Lord Chief Justice *Holt*.

IN this Case, wherein the Earl of Mountague, and the Dutchess of Albemarle, and others, are Plaintiffs; and my Lord of Bath, and others, Defendants, I shall open the Case very shortly as it stands upon the two Wills and upon the two Deeds.

The Case. There was a Will made in the Year 1675, by Christopher Duke of Albemarle, wherein there is a Disposition of several Parts of his Estate upon his dying without Issue to several Persons; but the main part and bulk of it is given to my Lord of Bath: And in that Will there is mention made of a particular Esteem and Affection which the Duke bare to my Lord of Bath; that he was the nearest of his Kinsmen by his Father's Side; and that he also was indebted to him for many great Acts of Friendship and Offices of Kindness performed to him and his Father. Then there is in that Will also an express Desire that the Title of Duke of Albemarle, by the King's Favour, might be conferred upon the Earl of Bath; and that the eldest Son of the Earl of Bath, and so the eldest Son of the Family successively, should be called Lord Monk: So that the Names of Albemarle and Monk may, with the King's Favour, remain with his Estate in the Posterity and Family of my Lord of Bath, in memory of the late Duke his Father and himself.

The Estate being so disposed of by his Will of 75, there are two Deeds made in the Year 1681, a Lease and a Release. The Release doth recite this Will; but in the Recital of it, there are some Differences from what is in the Will it self, some Variations from it. In this Deed it is mentioned, that the intent and design of the Deed was to dispose of the Estate, according as was in the Will: And whereas it might be thought strange that the Duke by his last Will, which by that Deed he doth confirm, and not intend to revoke, should give away his Estate from the Heir at Law; Therefore, for the Satisfaction of the World, the Duke doth declare the Reason which hath been frequently mentioned; and then the Deed disposeth of the Estate, some to the Greenvils, some to the Clarges, but the main and bulk of the Estate he settled upon my Lord of Bath. But in this Deed there is a Power of Revocation, to this effect, That it shall be lawful for the Duke at any time to revoke this Deed, upon the Tender of a Shilling, by Writing under Hand and Seal, in the Presence of Six Witnesses, whereof Three to be Peers of the Realm, and then to limit new Uses.

Then

Then he makes his Will in the Year 1687, and therein he gives his Estate in a different manner, that is, the bulk and main of it is given, instead of my Lord of Bath, to Mr. Monk, whom he supposeth to be his Kinsman, and desires that the Name and Title of Baron Monk may, by the King's Favour, be bestowed upon him, in case he himself died without Issue.

Now the Question is, Whether or no this Will in 87 hath revoked this Deed made in 81 in Equity, for there are but three Witnesses to this Will, and not one of them a Peer; so that in Law it is very plain it is no Revocation at all: It cannot be a good Revocation there, because the Power is not pursued, the Circumstances are not observed; there is neither the Tender of a Shilling, nor six Witnesses, whereof three Peers; nay, not only so, but here are but three Witnesses in all, and not one of them a Peer. The Question.

I am of the same Opinion with my Lord Chief Justice of the Common-Pleas, and my Brother Powel, that this is no Revocation in Equity, and that there ought to be no Relief had by the Devisees of the Will of 87 against those that claim by the Deed of 1681.

These Things are to be premised as granted, and not to be questioned.

First, That the Will of 75 was a good Will, there is no manner of dispute to be made of that. Things admitted.

Secondly, This Deed of Release that was made in 81, is a very good Deed, and there is no manner of dispute to be made of that neither; for if there had not been a Verdict in the Case, yet if they come to have the Opinion of a Court of Equity, touching Relief in Equity about this Deed, it ought to be taken to be a good Deed in Law, or they were not to come hither for Relief against it. And as this Deed is admitted to be a good Deed, so in this Debate all those Circumstances that appear in the Depositions are to be admitted to be true in this Cause. I do not say that they are never hereafter to be controverted, but now upon this Debate they are to be admitted true; as,

First, That Sir William Jones his Hand is to the Perusal and Approbation of the Proviso, and it is his writing.

Secondly, That he was a Witness to the Execution of this Deed: And,

Thirdly, That this is true which Errington swears about the Abstract of this Deed made by Sir Thomas Stringer, which being main Circumstances about the Deed, and controverted, now must be taken for true in the Consideration of this Cause. And then a third thing that is to be admitted without any Contradiction too, is, that this Will of 87 is a good Will.

The Cause standing thus, and all these things being taken for granted, the Question I say will be, Whether those that claim by this Will of 87, can have any Relief against those that claim by the Deed of 81? And I think there ought to be no Relief; but those that claim by the Deed of 81, have a good Title in Equity as well as in Law.

I shall not mention any thing of the Evidence that hath been given, or insisted upon to support the Deed, nor now answer any of the Objections made against the Truth of it; for I told you first, I take it for granted, that it is a good Deed, and a true Deed without all dispute. But to the Intent I may comprehend all the Matters that I think are any way considerable, and fit to be insisted upon, I shall speak to Four General Heads.

Four General Heads in question.

1. First, I shall consider, whether upon the frame and manner of this Deed of 81, there may be any Ground of Relief for the Plaintiffs against it.

2. Secondly, Whether there appears upon the Pleas and Depositions in this Cause, that there was any undue way or manner of obtaining this Deed from the Duke; or any Way or Contrivance, or Management for the contriving it in being afterwards, which may produce a Ground of Equity for the Advantage of the Plaintiffs.

3. Thirdly, I shall consider the Circumstances and Conditions of the Parties that are in this Cause, those that claim by the Deed of 81, and those that claim by the Will of 87, and whether upon that Account there can be any Equity raised in this Cause. And,

4. Fourthly, I shall consider the Person of the Duke of Albemarle, and the particular Circumstances he was under at the time of making this Will in 87; and whether by reason of him from whom the Estate proceeds, or the Circumstance he was under, there will appear any Ground of Equity in this Case.

1. Consideration. The first Consideration I lay will be, Whether upon the frame and manner of this Deed there be any ground of Equity for the Plaintiffs against it. There were several things under this Head that were insisted upon by the Councel for the Plaintiffs. As,

First, That this Deed of 81 doth partake of the nature of a Will, because it recites a Will, and it is made to confirm a Will, and therefore shall be revocable in a Court of Equity as a Will shall be in a Court of Law.

Secondly, That it pretends to recite the Will of 75, and there are several Mistakes in the Recital, and very great Variations from it.

Thirdly, That there are several Dispositions different from those in the Will, which it pretends to confirm.

Now for the first, to maintain that when a Deed recites a Will, and to say it self is made to confirm that Will; therefore this Deed shall be revocable in its nature in Equity, as a Will is at Law, I must needs say, is a Notion that I never heard started before. Therefore for that I must appeal to you, who are constant Practisers and Attendants here, whether it be not a Notion altogether new. And to me as it is a new Notion, so it is very fine, and seems impossible to be supported by any Reason, but must produce very strange Absurdities. It is not to me to be reconciled with any Reason of Law or Equity, as far as I understand any of either.

For to say that a Deed is revocable, because it relates to a Will, is first to contradict the nature and essence of a Deed; for a Deed takes effect immediately upon the sealing and delivery, and is impossible to be altered from what it is, and has in it, or to be revoked by him that made it. But because it relates to a Will, it shall be revocable as a Will is; that I say is a meer fine-spun strange Notion, not at all agreeable to Reason.

To say a Deed that relates to a Will, is therefore revocable as a Will is, not agreeable to Reason.

Next, such a Construction and Strain as this in Equity must overthrow the Intention and Design of him that made the Deed: For when a Man has made a Will, which is not consummate till his death, and after that makes a Deed, and limits the Estate in such a manner as it was disposed of by the Will: What does this Man mean but that those Estates which were, or arise by the Will upon his decease, shall have immediate effect during his Life? And whereas he thought with himself it might not be so convenient to leave his Estate wholly to depend upon a Will which might so easily be altered, it was his Mind and Intention that it should be made more firm by a Deed, which is more permanent.

Next, it is a mighty Strain to make a Deed revocable as a Will; for then you must first set up against that Will which was thereby revoked; for you cannot imagine, but that when a Deed is made, though to confirm a Will, the Estate limited thereby doth arise by the Deed, and the Will is revoked by the Deed. So you set up a Will that is no Will in Law, and that shall control a subsequent Deed which destroyed that very Will, which is strange and contrary to all Rules of Law and Reason.

Where a Deed is made to confirm a Will, the Estate limited thereby doth arise by the Deed, and the Will is revoked.

There were some Cases quoted wherein a Deed shall control a Will; as Dyer 49. it is said, If a Man makes a Feoffment to the use of his Will, which was anner'd at that time to the Charter of Feoffment, that that Will is revocable, notwithstanding there is an express Application in the Deed to that Will it self, and so the Uses arise by the Deed, not by the Will; and yet tho' this Deed hath relation to the Will, that Will may be revoked.

This indeed hath the Terms put in the Case, but in Reason is no way applicable to it. When a Man makes a Feoffment, and annexes his Will thereto, there the Design is that the Estate should arise, not immediately upon the Feoffment, but attend upon the Will. But if a Man make a Deed of Feoffment, and says it shall be to the use of such Persons, and for such Estates as in his Will, or as he shall give according to the Will, there tho' the Will doth mention the Names, and limit the Estates, the Uses do not arise by the Will but by the Deed: For tho' the Will be no part of the Deed, yet when the Deed doth refer to the Will, and the Will hath limited the Estate, it is as much as if all the Limitations had been comprized in the Deed.

And I take it that a Deed is not revocable, because it hath an immediate effect, and can be no otherwise revoked, but according to a Power reserved in the Deed it self. And that is Hulley's Case, Moor 756. A Man makes a Will, and he makes a Feoffment to the Uses mentioned in

A Deed not revocable without a Power reserved in the Deed it self.

in the Will, tho' the Will be revoked, as sure it is, yet it is a sufficient Declaretion to the Uses.

Objection. It was further urged, for the Support of this Notion, what is said in Hobart in the Earl of Ormond's Case. The Case is put a little short in the Book. A Man suffers a Common Recovery to the use of such Person and Persons, and for such Estate and Estates, as he should dispose of, and to, in his last Will. This was a Case in Ireland, and before the Statute of Uses was made there; and so we must look upon it in England as a Case before the 27 H. 8. and then there being a Feoffment made, he remains Cestuy que use in Fee in the mean time, for he hath a Power by Will to dispose of the Use, according as is expressed in the Deed. Then he makes a Deed in his Life-time, and giveth away the Inheritance of this Use, and afterwards makes his Will. Now here is a Deed that giveth the Inheritance of the use away; and here is a Will that doth controul and alter the disposition of this Deed. This was the use that was made of this Case.

Answer. Now in answer to that, Suppose it were so, this Will is but an Execution of that Power which proceeds from the Deed; for when a Man makes a Feoffment for the use of such Persons, and for such Estates as he shall limit by his Will, it is not the efficacy of the Will that disposeth of the Estate, but it is by virtue of the Deed: So that the Deed in his Life-time was no execution of the Power reserved in the first Deed, which was only to do it by a Will.

But I must say this further to the Case of the Earl of Ormond, that I do not take that Opinion of the two Judges, Hobart and Doderidge, there delivered, to be Law; and there were other two Judges, Montague and Hutton, that were of another Opinion, and others were of their mind, and it did not come to a Judicial Resolution. And my Opinion is this, that if a Man made such a Feoffment before or after the Statute of Uses, he hath the Fee-simple of the use vested in him in the mean time, and therefore hath a Power to dispose of it. And if he doth by Deed in his Life-time dispose of it, that is a good Disposition, and the Will shall not controul it, for he is as much Master of the whole Estate, both before and since the Statute of Uses, as if he had made a Feoffment in Fee to the use of himself; and then an absolute Disposition of this Deed doth extinguish and destroy the Power. If he from whom the Estate moved doth reserve a Power in any particular manner to limit any Estate or Estates by his Will, the whole Fee-simple is in him, and no Act he doth do to dispose of the Estate, will hinder him from executing of that Power.

And as for this I shall quote you but one Case, and that is in Lee 39, Broad's Case: A Fine is levied to the use of such Persons, and for such Estates as the Cognizor should limit and appoint by his last Will, and so the Case comes home to this Case; he after this covenants to stand seized of these Lands to the use of his second Son and his heirs, and then makes his Will, and disposes of the estate therein according to the power. The question was, which of these dispositions should take place, the Deed or the Will? The Will was according to the Power, reserv'd upon the

firſt Fine, and the Deed intervened before they come to execute this power; it was there held that having made a diſpoſition of the Eſtate by Deed, tho' by a Covenant to ſtand ſeized, that ſhould take effect, and the Will, tho' made according to the power, came too late to execute it. So that I think none of theſe Caſes that have been mentioned for this purpoſe are applicable to the Caſe in Queſtion, nor argue or prove any thing material for that which the Plaintiffs Counſel intended them for.

Obj. But they ſay, this Will of 1675, & Deed of 1681, make but one Conveyance, and then the Will that is the principal, that ſhall govern all the reſt. Now this is a a notion fetched from the Courts of Law, but very improperly applied in this Caſe as I think: For this Will being revoked by this Deed, is no Conveyance at all; where ſeveral Acts make but one Conveyance, every one has its diſtinct operation to carry on the main deſign. As a Leaſe and Releaſe, the Leaſe conveys the poſſeſſion for Years, the Releaſe conveys the Inheritance to the poſſeſſion by way of enlargement. So a Fine and Recovery, and Deed to declare the uſes, make but one Conveyance, but each performs its particular part: the Fine conveys the Freehold to one man, and upon the Recovery it is conveyed to another, and upon the limitation of the uſe it is conveyed to a third; all are preparatory Acts neceſſary to compleat the Conveyance of the Inheritance whither it was at firſt deſigned.

Anſ.

Where ſeveral Acts make but one Conveyance, each has its diſtinct operation to carry on the main deſign.

But how will they make a Will that hath no ſubſiſtance to be one Conveyance with a Deed, that before deſtroyed that Will? I cannot ſee how, nor is it reconcilable with Law or Reaſon. So that for that matter, I think they have no ground to inſiſt upon this point, that this being a Deed relating to a Will, may be revocable in Equity as a Will is at Law. But to go on to the next.

This Deed doth ſay it was made and intended to confirm the Will, and yet makes ſeveral recitals and limitations contrary to it.

Why ſuppoſe it were that it did recite the Will truly, and ſaid the Will diſpoſed of the Eſtate ſo & ſo; & then adds that it was made to confirm the Will, but yet diſpoſeth of the Eſtate quite otherwiſe than the Will doth, ſhall this avoid the Deed in Equity, or make it to have another Conſideration than it elſe would have? The re-citing part of a Deed is not at all a neceſſary part either in Law or Equity. It may be made uſe of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation. But when it comes to limit the Eſtate, there the Deed is to have its effect according to what limitations are therein ſet forth. And that is plain and full, without any manner of contradiction whatſoever.

The reciting part of a Deed is no neceſſary part either in Law or Equity.

Now becauſe a Deed is repugnant in ſome part, that is material, to what is immaterial, is that any ground in Equity to ſet aſide this Deed? Or make it more liable to a revocation than if they had been conſiſtent? That ſeems ſtrange. Then here are miſ-recitals and miſtakes, which I take to be miſtakes of the Clerk: and ſhall theſe miſ-recitals of the Will in the Deed deſtroy the effect of the Deed, when the meaning and intention of the parties is moſt manifeſt and clear how the Eſtate ſhall go? There is no reference in the limitations of the Deed to the Will, but only in the Recitals, and there are miſtakes. Now

A Deed repugnant in ſome part that is material to what is immaterial, no ground in Equity to ſet it aſide.

if the Limitations of the Will and Deed are not applied to the mis-recitals in the Deed, then those mis-recitals cannot hurt the Limitations in the Deed. If so be the Limitations in the Deed had been general to such as were before recited to have been limited in the Will, then there had been some ground to infer that these mistakes should be a foundation for Equity to rectifie those mistakes. For that supposes the Recitals in the Deed containing the disposition of the Estate by the will are right, and would come too late at the time of the limitations to recite them, and that were a mistake, that may be a good ground in Equity to relieve against the mistake. But when it comes only by way of recital to be disposed by the Will one way, and then doth in express words limit it a contrary way, the Intention is plain that it should go according to the limitations in the Deed; and there can be no foundations in Equity to set it aside. The Rule of Law is, Benignæ sunt interpretationes Chartarum. And I suppose there ought to be a great deal more indulgent interpretation of them in Equity, to maintain the intention of parties. So that as to that first point concerning the frame and manner of this Deed, and the contradictions to and mis-recitals of the Will in it, there is no foundation of Equity to relieve the Plaintiff against the Deed, unless the power of Revocation in the Deed were legally pursued.

Second Consideration.

The next thing is, whether there be any thing proved in the manner of obtaining it from the Duke, or mortgaging or continuing of it after it was obtained, be any foundation for Equity to relieve against it? And for my part I see none.

First I do not see any manner of Evidence to prove any indirect practice for the obtaining of this Deed from Duke Christopher. The most that can be made of it is but bare suspition, and indeed that a very slender one too.

But say they, can you prove the Duke ever read it, or had it read to him? That is a strong objection, when it is proved to be before Witnesses, and so many; sure that is but a slender ground of Equity the not reading of it. But nothing of surprize, or ignorance in the Duke of what he did in it, ought to be supposed, because Sir William Jones, who is proved to be the Duke's Counsel, was by, and a Witness to it. I told you at first Sir William Jones's hand to be to the Draught and Deed must be admitted, because I take it for granted that this at Law is a good Deed. And if I did not take it for granted that that was Sir William Jones's hand, and he was a Witness to the Deed, I should not take it for a good Deed. But I meddle not with the point of Fact, but take the Fact to be granted to bring the Judicial point in Question, so that it is his hand, and he is a Witness to this Deed.

Then secondly, it must be imagined that when Duke Christopher made this Deed, he did it with some design or for some purpose or other, and if so, you cannot imagine that the Duke was at all surprized therein, but that when it was executed it was according to that design and purpose.

Next Sir Thomas Stringer, who was the Duke's Counsel to peruse and amend the Draught, as appears by his own hand, taken by his Son and his view; Can imagine then that a man should be surprized unto the making of a Deed when his own Learned Counsel have perused and amend the Draught, and the Counsel he used particularly to advise with, is by at the Execution, and a witness to it; is to say, A man was Surprized when he had the advice of Counsel about it, and they were at his elbow at the executing of it.

Now I must confess I am to seek, and not well know what is a Fraud in Equity, that will avoid a Deed, which is a good Deed at Law. The Case of Bodville, and Wynne, and Roberts mentioned by my Lord Chief Justice, and my Brother Powel, that spake the last day this Cause came on, is I think a Case of great Authority in a Court of Equity, because it had a great translation both in this Court and in the House of Lords, before it came to a Resolution or Result. I shall put the Case in short as it was here in Court.

Bodvile, Wynne, and Roberts's Case, V. Rep. in Chan. 1 part 236.

Mr. Roberts, Son to the late Earl of Radnor, married the Daughter of Mr. Bodvile. Bodvile had made a Will, and given his Lands to the Children of his Daughter in Tail, and after this he makes another Will whereby he gave one part of the Estate to Mr. Wynne, and another part to a remote Kinsman. It did most plainly appear in the Depositions of this Case, that this Will was obtained by great Fraud and Circumvention; that is, Wynne got into his acquaintance by pretences of some little Offices of Friendship and Kindness, he got him away from his Friends and Relations, and during his sickness he did by false stories draw his affections from his Daughter, kept him in secret places, that no friend might come at him, and while he was so secreted and wrought upon, was this last Will made, whereby he gave his Estate away from his Child to a Stranger. All these pieces of practice were apparent before the Court at the hearing of this Cause, which was heard by my Lord Clarendon, assisted by

who all unanimously declared, that this was a Will obtained by fraud and by practice, and that there was great Reason if they could, to relieve against it. But they searched precedents, but could find none that would come up to the Case. Thereupon for difficulty, there was advice taken about it in the House of Lords; and there, upon Consideration, was an Order made, by way of advice to the L. Chancellor that he would proceed to do Justice to either party, tho' there were no Precedent found to govern the Judgment. Afterwards this Cause came to be heard again 12 June 1666. when my Lord Chancellor being assisted by my Lord Chief Justice Bridgman, my Lord Chief Baron Hales, and Mr. Justice Raynsford did declare, that there could be no relief, tho', as it was said before, it was apparently a Will obtained by Fraud, and this to the prejudice of the Heir at Law, who had never offended, or given him any cause to disinherit her. So the Bill was dismissed, but the Parties complaining in Parliament, were relieved by the Legislative Power by an Act of Parliament.

Now, besides that there was Evidence of ill practice in that Case,

but

but in this I say, I find none; this is so great an Authority, and does shew the fairness of a Court of Equity, that I think none can be greater: Equity would not relieve them, but they were put to seek their Relief by a Law made on purpose.

But I will suppose now in this Case, that when my Lord of Bath did understand the kindness of Duke Christopher, and knew of the Will of 75, and knowing the inconstancy of the Duke's temper, and other Circumstances in the Family, and the Revocableness of a Will, should have applied himself to the Duke, and told him, It is true, you have been so kind as by your Will to bequeath me a great part of your Estate, but you may be prevailed with on a sudden or by some Artifice or other, to alter this Will of yours; and you may be surprized into the doing of it; pray will you make a more solemn Settlement to confirm this kindness by a Deed; and had prevailed to get him to do it. Suppose I say he had done so, tho' I find no Evidence in this Case of any such thing; suppose he had been employed in the whole translation of such a Deed, is this unlawful? Or is it any harm? No, it is very innocent, he might lawfully do it; and if he had opportunity he might prudently do it. But I say, I find not so much as that in this Case, but this Deed was fairly obtained from the Duke; whether it was by the Advice, desire, or interposition of my Lord of Bath, doth not appear, or whether it were the Duke's own voluntary Act, tho' I think it is not material, whether it was the one or the other.

Obj. But it hath been said, that when Duke Christopher did design to alter his Will, and for that purpose sent for my Lord of Bath, to bring the Will of 75, which he had in his custody, my Lord of Bath should have told him of this Deed too: And therefore the concealing of the Deed of 81 from Duke Christopher is a kind of Fraud; and not making a discovery of it then, he shall not now take advantage of this slip, and have the Estate by this Deed; because if the Duke had considered the Proviso in the Deed, he would have taken effectual care to have had a good Revocation in all the Circumstances: And that he did not so revoke it, must be imputed to the Concealment of this Deed from the Duke, by the Earl of Bath.

So was the Case of Mr. Clare, at the Suit of the Earl of Bedford, which was opened the last Term. A man that stands by and sees a Cheat which might have been prevented by his discovery, shall not take advantage of his own wrong and profit by such Concealment. But

Ans. doth it appear in this Case, that my Lord of Bath knew to what purpose the Duke sent for his Will; or how or in what manner he would alter the Settlement of his Estate? Why must he be bound to take more notice of this Deed to the Duke, than the Duke himself? It was the Duke's own Act and not my Lord of Bath's, and why should he give him Notice of his own Act?

The Rule of Law, when one is obliged to give notice to another, is this: when the thing lieth more in the knowledge of the one than the other, and he cannot come to the knowledge but by his means: But when one man hath reason to know, and doth as much as the other, he is not bound to give notice to that other. Be-

Besides, it doth not appear, as I remember, (for it is some time since this Cause was heard) that my Lord of Bath did know to what purpose the Duke did call for his Will; and the Deed and Will were possibly both in the Custody of the Duke; for tho' at the time of the execution of the Deed it was delivered to my Lord of Bath, yet that was only for the due Execution as a Deed; for my Lord in his Answer saith, he knoweth not where it was afterwards, till delivered to him by the Duke with the Will, under one Cover, some short time before he went abroad. And so there is great Reason to induce the Belief that it was in the Duke's Custody.

Then as to the Objection of Secrecy, it is kept secret all along, and no body can give any account of this Deed. Take it for granted it was so; shall a Settlement in a Family (where the nature of the thing requires Secrecy) because it is kept secret, be set aside for Secrecy? It ought to be kept secret, and that is no Objection at all; Persons do not usually intend that all the World should know how their Estates are settled.

But say you, at least here is a general Presumption, take all together, upon the Circumstances of the whole Case, that there was some kind of Management in concealing this Deed. Now, in a Court of Equity shall Presumption be sufficient to found a Decree upon? If that shall avail in a Court of Equity, it is an easie matter, according to the Judge's Faith, to presume a Man out of his Estate. There are Presumptions of several sorts, some are violent, and some probable: A violent Presumption, that such a Man hath done such a Fact, must be when a Fact is done; and no other can be thought of to have done it: As if a Man be killed in a Room, and another Man comes out of the Room with a Sword bloody in his hand, and no body else was in the Room. Here is a plain Fact done, and tho' no body can swear they saw this Man do the Fact, that he killed him, yet from this Evidence there is a very strong Proof.

Presumptions of two sorts, Violent and Probable.

Of what force.

But a probable Presumption alone is no Proof to rely upon; where indeed there is some Proof of Witnesses positive, and the Presumption is probable that is added thereto, it may be a good fortifying Evidence, but it signifies very little of it self for a Foundation.

So that I think here is no Proof or Evidence, that my Lord of Bath did surprize the Duke; or that the Duke was surprized in this matter; or that there was any indirect means used to conceal it from the Duke. And so I have done with the Second head that I at first proposed. Therefore,

Thirdly, I come to consider the Persons that are concern'd in this Cause, that is, those that claim by the Deed of 81, and those that claim by the Will of 87. Those that claim by the Deed of 81, are Relations of Duke Christopher without all Question: My Lord of Bath that is intituled to the greatest part of this Estate, is a very near Relation, and a Person that had done many Kindnesses for the Family, had been constantly assisting to the Duke in his Business; and the others are near Relations too.

Third Consideration.

Then for those that claim by the Will of 87, Mr. Monk, that claims the main of the Estate, is in the Will called Cousin; but it is plain (if at all) he is not so nearly related: So that when in respect of the Persons that claim by contrary voluntary Settlements, there is an even Equality of Relation, and no difference of Consideration (much more when there is an Inequality) he that hath the best Title at Law must carry the Estate; For what is it that makes the difference, but the difference of the Consideration? As in the Case of a Deed in Consideration of Blood, and an After-Deed to a Purchaser for a valuable Consideration; the last shall take place, as the best Consideration.

But for revoking a voluntary Settlement, in favour of a subsequent one, where there is no difference between the Parties as to the Consideration, I think hath no ground in Reason. There is as much Equity for the one as the other. It is perfectly at large, and I take it to be a constant Rule, that where one Party hath no more Equity than the other, the Law must take place, and that in this Case being manifestly for my Lord of Bath, by this Verdict, Equity ought not to take it from him.

Cases in Chan. 1 part, 263, 264.

This principally was the Foundation of the Decree in that Case of Smith and Ashton, that has been likewise mentioned and urged before: There was a Power under Hand and Seal to be attested by three Witnesses, and to charge the Estate with Portions for younger Children; so it is a limited Power: Then he makes a Revocation for advantage of younger Children, but not exactly pursuant to the Circumstances of the Power. This was held good in Equity, and all the Reason in the World it should, because a Man is obliged to provide for his younger Children; and it is against all Justice and Reason to make such a Settlement upon the Eldest Son, as to send all the other Children a begging, being under the same natural Obligation to provide for the one as the other. Therefore, because of that natural Obligation, Equity hath been indulgent to support such Provisions, because the first Settlement that disabled him for it, was wrongful and injurious, and contrary to all Equity, and then in such case Equity is very indulgent.

But I would put this Case: A Man settles all his Estate upon his younger Son for Life, with a Power to revoke by a Deed, sealed in the Presence of three Witnesses; without more ado he makes his Will, and disposeth of his Estate to his eldest Son wholly, and that Will is attested (as put it before the Statute) by two Witnesses: Is this a good Revocation in Equity? I say, no; for the one is as nearly related to the Father as the other, the Considerations are equal, the one is as much a Son as the other, and therefore there is no great difference between them; and the younger Son who hath the Estate by Law, shall enjoy it, tho' afterwards it return back to him that was the eldest.

Fourth and Last Consideration.

The Fourth and last Point is this, Whether in respect to Duke Christopher, and those Circumstances that attended him, there be any Reason to relieve against this Deed in Equity. And here

Still it is said, If a Man make a Feoffment with a Power of Revocation under such Circumstances, and doth make a Revocation, where all the Circumstances are not observed, is he such an Owner still of the Estate as that Equity shall support the Disposition?

I say, no; for that is to set up Equity in direct opposition to the Law: For when a Man hath restrained himself by a particular Power, and hath no legal Right to dispose of this Estate, but by exactly pursuing that Power, Equity cannot enlarge that Right or Power.

Legally you agree he cannot; for if he could, then were there no Reason for imploring the Aid of a Court of Equity: And there is the greatest Reason he should be obliged by the Rule of Law in a Court of Equity, because it is a Law that he hath put upon himself: And that is the Equity of the legal Obligation, because it is supposed to be made by his own express or implied Consent, by his Representative to all Laws. Here is a Man that hath made a Deed, whereby he has actually restrained himself from disposing of his Estate; but in such or such a way. By the same Reason, that you in a Court of Equity will construe it a good Execution of the Power, where the Circumstances are not strictly observed, you may allow a Man to revoke a voluntary Settlement, when there is no Power reserved to him in the Deed so to do: And that I take it no one will be so hardy as to affirm.

A Man voluntarily makes a Settlement to the use of himself for Life, and after to other Uses, and reserves no Power of Revocation at all, he cannot revoke this; no, not in Equity: And the Reason is the same as to the Power reserved, where it is not pursued; for he has no other Right to do it but by the Power, and it is as if he did it without a Power, unless he make a due use of such a Power as he had.

Where a Power is reserved, and not duly pursued, it is the same as if he did it without a Power.

It will be manifestly inconvenient, if a Court of Equity have such a Latitude in Power of Revocation: For it is not sufficient to say it is unreasonable a Man should be restrained, when a Man will restrain himself; nor do I see what Reason there is to say it is imprudent. Indeed, to argue thus, is to make a Man less Proprietary of his Estate, than the Law hath made him, that he shall not settle his Estate in such a manner as he pleaseth to order for himself; a Man at this rate is never master of his Estate: He makes the first Settlement as Owner, and it is no matter whether he hath a Reason for making it or no, stet pro ratione voluntas; but then when he hath so done, both Law, and Reason bind him to observe it, and there is no Reason for a Court of Equity to avoid it.

I must confess, Courts of Equity would have enough to do, if they were to examine into the Wisdom and Prudence of Men, in disposing of their Estates, and if they were not discreetly, but foolishly done; therefore to set them aside, there would need more Courts of Chancery than there are, to dispatch the Business of Equity in this Point: But be a Man wise or unwise, if he be legally Compos mentis, he is the disposer of his own Property; and tho' he do not dispose

Be a Man wise or unwise, if legally *Compos Mentis*, he is the Disposer of his own Property.

diſpoſe of it ſo diſcreetly as a Judge or a great Lawyer would do, there is no Reaſon Equity ſhould interpoſe to alter it.

Beſides, there may be a very good Reaſon for a Man to put ſuch a Reſtraint upon himſelf, and for a Wiſe Man to do it too; for a Man may know the frailty of his own Temper, how apt he may be to be ſurpriſed and prevailed upon to make a precipitate or inconvenient Will, Settlement, or Diſpoſition of his Eſtate. Now to reſtrain this Infirmity which I have, and to prevent an Inconveniency that may ariſe by my diſpoſing of my Eſtate upon a Surpriſe, I will reſtrain my ſelf, and ſettle my Eſtate ſo and ſo, that if there be a deliberate Intention in me to alter it, I may ſolemnly execute ſuch Intention; I will therefore have ſo many Witneſſes, and thoſe of good Quality, that, if they find me about any ſuch Action, may adviſe me in it, and prevent any apparent Surpriſe into the doing of any Action that may be fooliſh, raſh, or prejudicial: For that Reaſon I will bring my ſelf under ſuch and ſuch Reſtraints.

And when we ſee a thing done that may have a good Reaſon given for it, as there may be for this circumſcribed Power, to reſtrain from raſh, ſudden Actions, it is to be preſumed that it was done upon good Reaſon; and therefore the pretended unreaſonableneſs of ſetting the Owner of an Eſtate by himſelf, mentioned at the Bar, is no Argument againſt it: For it may be rather (and that is rather to be preſumed) upon very good Reaſon than upon no Reaſon at all.

Now I think it was never yet determined, or ſettled in a Court of Equity, that a Revocation that did not purſue the Power was good in Equity: It has been ſettled and decreed not to be good, and that is the Caſe of Arundel and Philpot, which came firſt into the King's Bench, and then into Chancery, and afterwards into the King's Bench again, and there it had its Period. A Woman makes a voluntary Settlement upon a Friend, with a Power to revoke upon the tender of a Guinea; and upon ſome falling out or Quarrel that happened between them, ſhe makes another Settlement upon Arundel: At firſt in the King's Bench they could not prove the Tender of a Guinea, and ſo the Revocation was not good at Law; therefore they come into a Court of Equity to be relieved. It was held that no Relief ſhould be had in the Caſe, altho' there was a Proof of Provocation given, a Quarreling and Falling-out, and ſo there might be ſome Reaſon to revoke, but no Reaſon to revoke otherwiſe than according to Power: So the Bill was diſmiſt. Afterwards upon a Tryal at Law, that Matter was ſubſtantially proved, that in the heat of the Provocation the Guinea was tendred, and conſequently a good Revocation; and that I look upon as a full Authority that there can be no Revocation in Equity where it's not a good Revocation at Law, unleſs there be a particular Intention in the Party to revoke, which he could not effect purſuant to the Power, by Fraud or Accident.

Arundel and *Philpot*'s Caſe.

No Revocation in Equity that is not good at Law, unleſs the Intention hindred by Fraud or Accident.

The Caſe of Thorn and Newman I take to be good at Law, and therefore to be ſure good in Equity; There was to be a Tender of 12d. at a Day, in the Middle-Temple-Hall, the 12d. was tendred at the

the day but not the place, and accepted. That was before my Lord Chief Justice Hales, and the Party nonsuited upon it. For upon a Condition to pay money at such a day and place, the money be tendred to the Persons at the day, tho' not at the place, that Tender to the person is good, being a Case of money, but it is not so in a Collateral Condition for doing of any other thing. And tho' it had not been in that Case good at Law, it might be held to be good in Equity upon another account; because, there were Children in the Case, and it was to make provision for them.

Now I do acknowledge that a Power of Revocation not well executed at Law, may be in Equity in some other Cases: As where a man having such a Power has a real intention to revoke, and his intention is known, but he is prevented by a particular accident, and surprized when his design was so to do, but he could not perform that design, as by reason of Sickness, or that it was to be done in a place where he could not go. If any accident obstruct that intention, it shall be lookt upon as good, and shall prevail.

But now in this Case of the Duke of Albemarle, it doth not appear that he had any such intention of executing his power. It is true, he made his Will, which is a quite contrary disposition of his Estate. That is an Evidence of his intention to make a new Will, but not to revoke this Deed; he was no way hindred by any accident or irremovable Impediment from executing the power according to the Circumstances. He was in the place where best of all throughout England he might have had three Peers to be Witnesses of it. The Will was executed in London, at Sir Robert Clayton's house, and there were then two Peers in the house; Therefore since he had an opportunity to do it well, and would not do it, this can never be construed a good Revocation in a Court of Equity. And I think truly that any such construction would induce many Absurdities. For;

Absurdities that might follow.

1. First, It is to set up a power in a Court of Equity in direct opposition to the Courts of Law, and so let a man loose in Equity for no other reason, but because he hath restrained himself at Law, by a Law of his own making.

2. Secondly, It is as much as to say, That because a man may dispose of his Estate one way by Law, therefore in a Court of Equity he shall dispose of his Estate any way. That is a very strange but a true consequence of this Doctrine, because a man settles his Estate such a way, with such a power to alter it in such circumstances, therefore he shall do it any way. At this rate Tenant in Tail may dispose of his Estate without a Fine in Equity, because he might have done it at Law with a Fine; for the same Equity there is in both Cases. So a Copyholder of Inheritance may in Equity dispose of his Estate without a Surrender, because he might do it at Law by a Surrender.

3. Thirdly, It were to enable a man to give away more than he hath in him, for he has no more in him than according to the power reserved to himself. And,

4. Fourthly, It is to frustrate the intent and design of all Settlements whatsoever; so that I think there is no reason at all for this Court to let a Man loose, that has thus restrained himself, unless there be some special reason in the particular Case, for the sake of which a man ought to have his Case vary from the ordinary Rules.

Then let us consider next the Circumstances that the Duke was under at the time of making this Will; you that are for the Plaintiff say that he had forgotten this Deed, and therefore it being an old and forgotten Deed, it shall not have any regard in a Court of Equity, it not being taken any notice of by the party himself.

Objections answered.

First I pray consider whether the Evidence does not prove the quite contrary: it was a Settlement made very solemnly; it is very well attested by six Witnesses, Persons of consideration; it was done with deliberation, and done but in 81, the Will is in 87; it is not to be presumed that the Duke did or could forget a Settlement so solemnly and deliberately executed. I say it is hard to presume it, but rather the contrary, that he did not forget it.

Besides tho' he had forgot it, Sir Thomas Stringer who was so instrument about this Will had not forgot it, for he made an Abstract of it about that time with the very date in it. And I take it the memory of the Councel in such a Case, is the memory of the Client. Suppose a man make a Purchase and he carrieth the Deeds of the Title to Councel, and he espieth a trust in the Deed, and acquaints his Client, and yet he will purchase, shall Equity relieve? It may be the Councel overseeth this Trust, and the Purchaser is called to account about it; says he, I had no notice. I knew nothing of any such trust; I am a Purchaser for a valuable consideration, and it ought not to affect me. But then they come and prove that the Deeds of the Title were carried to Counsel, they saw this trust or had an opportunity to see it. Then I take it, notice to the Councel is notice to the Client, and the man that paid the money must lose the Estate: So here Sir Thomas Stringer's memory is the Duke's memory.

But pray how comes it to pass that forgetting of a Deed is a ground to revoke in Equity? Must the goodness and validity of a Deed depend upon the memory of him that made it? Memory is slippery, but a Deed is permanent, and made to abide for ever. Because men are apt to forget what they have done, therefore shall their Deeds have no more effect in a Court of Equity than if they had never been done at all? This I confess is very new and strange Doctrine to me; when a thing once comes to be put into writing, we say it is never forgotten; Litera scripta manet.

But then truly they say it is inconsistent with the Honour of the Duke of Albemarle, that he should make this stir and doe about this

this Will, and pretend such kindness to Mr. Monk, and desire a Title of Honour for him, and yet not intend to revoke this Settlement that stood in the way. The others they say, how is it consistent with the Duke's Honour to intend to revoke it when there was such a Friendship between the Duke and the Earl, so many Services and Obligations performed by the Earl, such a trust and confidence reposed in him even to the last, as it's plain there was? How comes this to pass? But so it is; they are Acts very much inconsistent I confess. But for persons honours in judging of Causes we have nothing at all to do with them.

For my part I see no reason in the World that the Duke had to alter his mind as to my Lord of Bath, there is no appearance of any unkindness or displeasure conceived by the Duke against the Earl, but an intire trust and confidence to the very last, as is evident by the order of the Keys of the Evidence-Room to be delivered to him when he went away, and to consult with him upon all Occasions.

But withal, I do not know what the meaning of it should be, if he really intended any effect as to the Will of 87, which without all question is well proved; and were it not for this Deed, would be a good disposition of the Estate. Yet tho' it doth contradict the Deed of 81, I cannot but take that to be a very good Deed, and not to be set aside by this Will.

I have nothing further to consider in this Case, nor are we to make presumptions, and then to make inferences from thence. We are to judge upon the Fact as it appears in the Depositions which are plain and clear, and upon these we are to determine our opinions, and nothing else that is Dark, and that we cannot come at further than Conjecture. There have been other things said in the Cause, which I omit on purpose, because I would mention only those that are most material. Upon the whole matter, I am of opinion there ought to be no relief in this Case against my Lord of Bath and those that claim by the Deed of 81. Conclusion.

Lord Keeper.

I Shall first take notice how these Causes stand in Court, and who are the parties in Judgment before the Court.

Here are three Bills, one in which the Dutchess of Albemarle was Plaintiff, and since the Intermarriage my Lord of Mountague is also Plaintiff against my Lord of Bath and others Defendants, and this Bill sets out the late Duke of Albemarle's Marriage-Settlement, and his Will of 87, with the solemnity both of preparing and executing it, and doth complain that the Earl of Bath sets up another Will, and a Deed in 75, and 81, whereby he seeks to frustrate the disposition of the Duke's Estate by the Will of 87. And the Bill doth alledge that if any such Deed was ever executed by the Duke (which The Case, as it lies in three several Bills.

(which they have reason to doubt and do not admit) they believe the same was imposed upon the Duke by surprize, and not fairly obtained, and by fraud were concealed from the Duke, and ought to be set aside in Equity, tho' the power of Revocation in the said Deed were not strictly pursued, because his intention appears to revoke it, and dispose of the Estate otherwise by making the Will in 87: And if it should not be set aside, then the Dutchess ought to have the Lands limited to her by that Deed, and the Rent-Charge of 2000 l. a year, over and besides the Jointure settled upon the Marriage, and confirmed by the Will of 75. And the will of 87 ought to stand good as to the Personal Estate and Legacies therein; and so prayeth to be protected in the enjoyment of the Personal Estate, and specifieth Legacies given to the Dutchess discharged of the Duke's Debts.

There is another Bill brought by Christopher and Henry Monk, which complains of my Lord of Bath, and the others setting up this Will of 75, and Deed of 81; And I think in the same words, or to be sure, to the same effect with the other Bill, and prays that both Will and Deed may be set aside, and the Plaintiffs may enjoy the benefit and Estate given them by the Will of 87.

Then there is a third Bill of my Lord of Bath, Mr. Greenvill and Sir Walter Clarges, in which they set out the Will of 75, and the Deed of 81, and the continuance and constancy of the Duke's Friendship and Trust to the time of his Death, and complains that the Dutchess and other Defendants set up the Will in 1687, and do pretend that amounts in Equity to a Revocation of the Deed of 81; And this Bill prayeth that the Personal Estate may be applied to pay the Duke's Debts in discharge of the Real Estate, which they pray may be confirmed to the Plaintiffs in that Suit, and a discovery of the Writings about the Real Estate; and that they may be brought into Court, and delivered up to the use of the Plaintiffs.

These Causes were first heard before the Lords Commissioners, so long ago as the 8th of July 1691, then was there a Decree made that the Personal Estate should be accounted for, and applied for the payment of the Debts; but before the Court would deliver any final Judgment as to the real Estate, they ordered a Trial at Law to be had in an Ejectment, wherein the Dutchess and Mr. Christopher Monk were the Lessors of the Plaintiffs, and the Earl of Bath, Mr. Greenvill, and Sir Walter Clarges, to be Defendants to try the Title to the real Estate, and the Plaintiffs were only to insist upon the Will of 87, and the Deed of 81, so that as the Defendants Right upon the said Will and Deed might be fairly tried. And all Exhibits were to be left with the Master three Weeks before the Trial, for either side to inspect, take Abstracts and Copies, as they should think fit.

According to this Order, in the Michaelmas Term after, there was a Tryal at the King's Bench Bar, and upon that Tryal a Verdict passed for the Defendants in the Ejectment, the Earl of Bath, &c. upon the Deed of 73, and Deed of 81. After the Tryal, these Causes came to be heard again before the Lords Commissioners, about a Year and a half since: At that Time there was no Complaint made of the Verdict, nor any motion for a new Tryal. But after the Counsel had been heard several Days, the Court took time to consider of their Judgment; and before Judgment, one of these Causes abated by the Marriage of my Lord of Mountague and the Dutchess; and by that and other Accidents, the Cause hath been delayed till the late Hearing before the Court, assisted by my Lords the Judges, who have delivered their Opinions. And now the Causes stand for the Opinion of the Court, upon what appears in the Pleadings and Proofs, and what has been so largely insisted upon on either side.

Upon which, the Verdict being at Law for the Defendants, I must take it as my Lords the Judges have already declared, not only that these Deeds of Lease and Release, of the 15th and 16th of July, 81. were duly sealed and executed by the late Duke of Albemarle, but also that they stand still in force, and unrevoked at Law; for if they had not been so, the Verdict could not have been, as it was, for the Defendants.

Therefore, as that must be taken for granted, that these are good Deeds in Law, the only Matter at present for the Consideration of the Court, is, Whether upon the Debate of this Cause there be sufficient Ground in Equity for this Court to interpose in the Case, so as to set aside these Deeds as not good in Equity, or revoked by the Will of 87, or no? And I shall, as to the Matter of the Question, conclude my Opinion the same way with my Lords the Judges that have delivered theirs before.

The only Matter in question.

And with respect to this Matter, I shall here consider who the Parties are in Judgment before the Court, and what hath been alledged as Reasons and Grounds to induce the Court to set aside this Deed in Equity.

There is no Purchaser in the Case, no Creditor, no Child unprovided for; but all the Parties claim by voluntary Conveyances on the one side and the other; so that at least they stand equal; or if there be any Circumstances as to the Persons that have any weight, it is on the Part of my Lord of Bath.

There have been several Things insisted upon by the Counsel for the Dutchess and Mr. Monk, as Grounds whereon they would find that Equity which should impeach this Deed of 81: I would mention them as I apprehend they were offered, and I will, as far as I can, avoid being tedious, or use unnecessary Repetitions of what has been already said.

Grounds offer'd for impeaching the Deed of 81.

1. First, It has been offered, that this Deed was obtained by Fraud and Surprize.

2. Secondly, If it were originally fairly obtained, yet it was unduly secreted and concealed from the Duke, that he could not come to know the true Contents of his Power; or if it were not concealed, yet it was utterly forgotten by the Duke, which was the Reason and Occasion why sufficient Care was not taken to execute the Power as it should have been.

3. Next, That though the Power of Revocation was not literally executed, yet his Intention appearing clearly to dispose of the Estate otherwise, it ought to be supported in Equity.

4. Then that Deed of 81 was but ancillary (that was the Phrase) to the Will of 75, which being agreed to be revoked by the Will of 87, the Deed must fall with it.

Another thing was, that what the Duke had done amounted to a Revocation.

Then that there was a general Trust, and the Duke remained Owner of the Estate, and might charge it as high as he pleased to the utmost value, and so being absolute Master of the Estate, his subsequent disposition of it by his last Will ought to be made good in Equity.

There are many things accumulated together, and so make the better shew; but it is best to consider them severally, if we would know the true weight of them.

To the first Head.

It is true, it is charged in the Bill that this Deed was obtained by Fraud and Surprize, and that it was concealed from the Duke, or forgotten by him, and he had an Intention to revoke, and went as far as he could; so that they are sufficiently let into this Matter by what is charged in the Bill. But whosoever reads over the Depositions, will see that the End they aimed at, was, to attack the Deeds themselves as false Deeds, and not truly executed; but that being tryed at Law, and the Will and Deeds verified by a Verdict, the Councel have attempted to make use of the same Evidence, and read it all, or at least the greatest part of it, as Evidence of Surprize and Circumvention.

But I think that ought to be well considered by the Court, for we are not to found our Judgment upon that Evidence, which, if it be to be regarded at all, did amount to no more than what was insisted upon, and which is positively contradicted by the Verdict.

Fraud and Circumvention, things not to be presumed.

As to Fraud and Circumvention, it must be granted me, that they are Things not be presumed; it is all denied in the Answer, and the Proof must be very clear, if it be to be regarded by the Court.

Surprize, what.

Now, for this word (Surprize) it is a word of a general Signification, so general and so uncertain, that it is impossible to fix it; a Man is surprized in every rash and indiscreet Action, or whatsoever is not done with so much Judgment and Consideration as it ought to be: But I suppose the Gentlemen who use that Word in this Case, mean such Surprize as is attended and accompanied with Fraud and Circumvention; such a Surprize indeed may be a good ground to set

aside a Deed so obtained, in Equity, and hath been so in all Times; but any other Surprize never was, and I hope never will be, because it will introduce such a wild Uncertainty in the Decrees and Judgments of the Court, as will be of greater Consequence than the Relief in any Case will answer for.

They say this Surprize was made out two ways, by Matters that appear in the Deeds themselves, and by Circumstances in Pais that arise out of the Deeds.

As to the Matters that appear in the Deeds themselves, they urge,

First, That it is expressed in the Deed of Release that it is made in corroboration of the Will, which is inserted throughout

Objections to the Deed it self.

Then that it is imported to be for the Confirmation of the Will, when in effect it doth fully revoke it, because there are no Limitations in the Deed, but such as vary from those in the Will.

Then that it is for securing the Legacies in the Will, and yet it self defeats the Will.

That as to a great Part of the Estate, the Deed limits it to my Lord of Bath after failure of Issue Male, excluding the Daughters, whereas in the Will that Limitation is after failure of Issue generally.

That the Provision in the Deed for the third Son is ineffectual, because the Duke had not Power to settle it so.

That the Power of Revocation is unreasonably fettered, and the Covenant whereby the Duke, who was then very young, is obliged not to revoke the Will, is a derogatory and illegal Covenant.

And the unskilful Phrase and Language of the whole Conveyance must be a Demonstration that Sir William Jones was not imployed in it, as is pretended; these are the Objections to the Deed it self.

Now as to the Misrecitals, as my Lord Chief Justice has said, they will have no Influence upon the Limitations, because the Recitals in a Deed are not made the Measure of the Limitations in it: Besides, as I apprehend, here are none of these Misrecitals which are of that nature, as to draw on the Duke into a Mistake in the favour of my Lord of Bath, for the Recital that the Dutchess had a much greater Estate by the Will than she had before, as the Limitation of Dalby and Broughton for Life, when it was but during Widowhood, this might lead the Duke indeed into mistake in favour of the Dutchess, as it did, and might have induced greater Limitations of the same kind, but never to the advantage of my Lord of Bath, who was to come in Remainder; so that all the Inference that can be made from those Misrecitals, is only that Sir Thomas Stringer, who (it is apparent in Proof) drew the Deed, was a careless Man.

Answers.

Then they say the Variation of the Limitations from those in the Will, shewth that it was to revoke the Will, and not to confirm it; as to that,

First,

First, Such Variation is a Proof that the Duke, between the time of the Will, and the time of the Deed, had altered his Mind as to those Particulars; but to carry it further, I see no Reason in the World.

Next it hath been observed, that the Words of the Deed which purport the End of it to be for the Confirming of the Will, must plainly in Reason infer to the principal Designs of the Settlement, which was to dispose of his Estate to my Lord of Bath, and the nearest of his Relations, and not to refer to any particular Limitation in the Will; and that it doth so confirm the Will, as to the main principal Limitation of the Will, is plain: and it doth appear by the very phrasing of the Deed, that besides the confirming of the Will, he did mainly design the setting of his Estate.

Then let us consider the Differences in point of Limitation between the Deed and the Will.

First, They say in the Deed, there is an Estate limited to the Duke for Life; which is not in the Will, that is proper in a Deed, but would have been absurd in a Will which is not to take effect till after his death.

Then for that Variation in the Limitation to the Dutchess, it is not material in point of value, but for duration to the Earl; and it was a reasonable thing so to make it; for since he did intend to charge his real Estate with great Legacies, it had been impossible to have sold any Part of it that had been under a Rent-charge of 6000 l. and therefore it limits Lands of that value.

As for the Limitation of Norton-Disney, which indeed is to the Advantage of my Lord of Bath, and is the only Variation from the Will which is so; for with respect to the Essex and Northern Estates, my Lord has but a Remainder after failure of Issue in general, but in this it is after failure of Issue Male. But then it is to be considered, that the Honour would fail upon the Duke's death without Issue Male, and he did intend and desire that the Honour of Duke of Albemarle should come to my Lord of Bath: His Father had gone so far in it, as to procure a Promise of it under the Sign-Manual by King Charles the Second, and at the same time he had an Estate of 15000 l. a Year; and then it became him well that such a Part of the Estate should go with the Honour.

As to that Objection, That thereby there was no Provision made for Daughters, it were indeed a very great one, if indeed there were no Provision at all for them: But it means no more than that if he left no Sons, there would be an ample Provision out of the rest of his Estate for Daughters; and so in effect it is upon the Marriage-Settlement and the Will of 87; so that if it be an Argument of Surprize as to the one, it is the same as to the other.

Then for that Provision that is made out of Rotherith and Norton-Disney, for the Third Son, it must be admitted, that as to my Lord Duke's Mind in the Matter, it would be ineffectual; but there can be nothing inferred from thence, but that there was a great

Neglect of looking into the Settlement: But that will be no Ground in Equity to relieve against this Deed; for if it should be so, how many Settlements must we set aside upon Mens settling that over which in part they had no Power of making such Disposition, because the Persons concerned in drawing the Settlement, did not take sufficient Care in every Particular, to pursue the Power he had who makes the Deed?

Besides, there is the same Mistake in the Will of 87, in relation to Potheridge, where the Barony for Mr. Monk was to be fixed, it being by a Settlement in King Charles the First's Time so settled in Tail, that it could not, or was not legally to be disposed of by Will.

Indeed it was said that there were some Articles made with Pride about that Matter to carry the Estate according as the Duke should direct; but those Articles cannot answer the Objection, for they were made three Months after the Will, and then they were made with a wrong Person, and so signify nothing.

It has been objected, That this Deed pretends to be for securing Legacies in the Will of 75, but defeats them: That is a Mistake in the Objection; for it confirms the Will certainly as to the Legacies, and doth create a Trust for performing and paying them: Indeed by a subsequent Act, (viz.) the Will of 87, there may be an Alteration made; but that is no Argument against this Settlement it self.

There was another Objection made, and that was, That the Power of Revocation was unreasonable, especially back'd with such an unreasonable Covenant not to revoke: But as to that, it is to be considered what the Design of this Settlement was; he had made his Will before, but he thought himself unsafe under that Disposition; he was under Apprehension of being applied unto, and importuned to dispose of his Estate otherwise than he had a mind it should go, therefore he intended this Settlement as a Guard against any Surprize of that kind; and that being his Intention, if it had been only a general Power of Revocation, it had been no more than what any Will or subsequent Act done by him would have effected, but that had not answered his Meaning.

And so as to the last Covenant in the Deed, which they call the Derogatory Clause, whereby the Duke covenants not to revoke the Will otherwise than as aforesaid, I take it, that doth import no more but that as to the preceding part of the Deed, he guards himself against Surprize as to the Real Estate, so he doth here as to the Personal Estate. And though it prove ineffectual at Law, that is not material as to the Intention of the Duke.

The last Objection upon the Deed, is, the penning it, which is an Objection that is to go through the whole Deed; but this Objection goes further than the Point for which it is alledged; for if it prove any thing, it proves it to be a false Deed: But for this, I do not find it so much as suggested that this Deed was

drawn by Sir William Jones; my Lord of Bath indeed says, that it was left to the Care and Conduct of Sir William Jones; but as to what appears, he was only concerned in the Proviso: For it is very good Reason to believe, when he says [I approve of this Proviso] he did not refer his Opinion to any other Part of the Deed: And indeed any one who knew or remembred him, will think that he concerned himself with no other Part but what he set his Hand to the Approbation of.

I have taken notice of those Objections and Arguments urged by the Councel, which, taken altogether, should induce their Ground of Equity from a Surprize in obtaining this Deed; but when they are severally considered, they seem not to be of such weight as is contended for.

But if the Objections had been more in number, or of greater Consequence, yet let the Deed be never so ill drawn, and the Mistakes and Misrecitals never so many, and the Differences of Limitations in the Deed from those in the Will never so many too: Yet if this Deed were really executed by the Party, all this will not be a sufficient Ground in Equity to set aside this Deed. And the Councel for the Plaintiffs were very well aware of this, and therefore they go to other Circumstances out of the Deed, to shew this Surprize; and, as far as I can observe, the Objections upon this Point are these:

Other Objections from Circumstances out of the Deed.

That there is no Proof of any previous Direction for drawing of this Deed, there is no Proof of the Draught or Deeds being read to the Duke, no Counterpart was executed, the Trustees were not acquainted with it; there was an Estate limited to Sir Thomas Clarges, when there were great Differences between the Duke and him; it is not subscribed by the Duke's Councel, as all Deeds executed by him used to be; that it was not ingrossed according to the Draught, and that in a very material Place; for if it had been according to the Draught, the Duke had been Master of the Estate by a general Trust; and if it were not perused by Sir William Jones, or he was not a Witness to it, then so far as Sir William Jones was surprized in the Matter, the Duke was so too.

Answers.

Now as to the want of Proof of any previous Directions for this Deed, that is not strange after such a length of time; Sir Thomas Stringer, who drew it, is dead; four of the Witnesses to the Execution of it are dead too: But the Presumption is very strong, when the Draught is of Sir Thomas Stringer's Son's hand-writing, and corrected and interlined by his own Hand in several Places; that he had Orders and Directions from the Duke to prepare such a Deed.

The reading or not reading the Deed to the Duke, doth not appear; it might be read to him before, and it was not necessary it should be read to him at the time of executing; if it were, then the Will of 87 lies open to the same Objection, for that was not read to the Duke when he sealed it.

As to that Objection, That there was no Counterpart, nor the Truſtees acquainted with it, that can be nothing of an Objection; for the Deed remained in the Duke's hands till a little time before his going to Jamaica, as appears by my Lord of Bath's Anſwer, which hath not been falſified as I know of in any Point; nor was there any Occaſion to give Notice to the Truſtees, becauſe there was no manner of Eſtate or Truſt lodged in them. But my Lord of Bath was the only Perſon that had any Truſt in him by the Deed, therefore there was no Reaſon that it ſhould be known to any one but him; and the nature of the thing, and all the Proofs, ſhew that it was intended to be concealed.

Then as to the Story of Sir Thomas Clarges, and the Differences between the Duke and him, there is no Proof of it; it is at moſt but an Hear-ſay, teſtified by one Witneſs.

That it was not ſubſcribed by the Duke's Councel, as all his Deeds uſually were, it ſeems to me to be of no very great weight, when tht Draught appears under Sir Thomas Stringer's Son's Hand, interlined and corrected by himſelf, and Sir William Jones a Witneſs to the Execution, and preſent when it was compleated; ſure that can never ſignify any thing.

As to the other Objection that was made, That the Deed was not ingroſſed according to the Draught, and the Variation is in ſo material a Part, as to make the Duke Maſter or not Maſter of the Eſtate, it ſhould be conſidered, firſt, That upon view of the Draught it is plain, Words have been cut off. and there is a poſitive Witneſs who ſwears that he twice ingroſſed the Deed by the Draught; it is poſſible that a Man may twice leave out the ſame Words in ingroſſing a Deed by a Draught; but that he ſhould twice add the ſame Words that were not in the Draught, is very ſtrange, and not eaſily to be believed.

Then ſay they, This is not the Draught that was firſt peruſed and approved of by Sir William Jones: That is certainly ſuch an Objection as never was made before; and indeed it is likely there never was Occaſion to make ſuch an Objection till the laſt Hearing; for it may be it was not cut till then: But pray let it be conſidered for whoſe Intereſt it was to have this Draught cut or altered from the Ingroſsment: It is impoſſible it ſhould be cut off for the Intereſt of my Lord of Bath, by the Objection that ariſeth from it; for let any Words in Nature have been there, they could not have been of ſuch Diſadvantage as they would have it to be: However, be the Alteration of the Draught what it will, if it were not done by the Defendants, nor was for their Intereſt to be done, nor done before the Execution of the Deed, it all ſignifies nothing.

But I think it is fit and proper here to ſay ſomething to that Notion, that where the Councel is ſurprized that is a Surprize upon

upon the Client: I take that to be a Matter of very great Consequence, and I fear it would shake most of the Settlements of Estates in England: And for that I would mention the Case of Sir James Herbert, and the late Lord of Pembroke. There was a Bill brought in this Court to set aside the Will of the Elder Brother, who was the last Earl of Pembroke but two; Sir James was Heir at Law, and the other was but half-Brother.

Sir *James Herbert's* and the Earl of *Pembroke's* Case.

The Earl had taken a Displeasure at his Brother, and sent Directions to Mr. Swanton to draw a Will and Settlement of his Estate, and amongst other things orders, to be sure that the Brother should have no Power over the Estate to dispose of it; and because that in his Grandfather's Will there was such a Settlement as he liked of, he sends him that: Swanton makes a Will, and limits an Estate to Sir Philip Herbert the Brother for Life, and the Remainder to the Heirs of his Body; this Will is brought by the Councel to the Earl, and read, and executed, and held to be good: Yet this was a notorious Surprize upon the Councel; for nothing is plainer than that the Councel had made a Mistake, or knew not the Law: He did not, at best, consider, that upon such a Limitation, the Law vests the whole Estate-Tail in him, and he may dispose of it.

Tenant for Life, the Remainder to the Heirs of his Body, the Law vests the whole Estate-Tail in him, and he may dispose of it.

It is plain he had not pursued the Will of the Grandfather; but yet when this Cause came to be heard before my Lord North, when the Will appear'd to have been truly executed, the Court declared it was a Misfortune that they did not go to a better Councel: And it was sent to Law to try whether it was the Will of the Earl of Pembroke or no; and it being found to be the Earl's Will, the Bill was dismissed with Costs.

Thus I have taken notice of what has been offered to prove the Surprize; I would shortly mention on the other side, what hath been insisted upon to shew that there was nothing like Surprize, but all was done upon a very good Ground, and pursuant to a settled full Purpose, continued for so long a Tract of Time to the Duke's Death.

First, say they, it doth appear there was a very near Relation between my Lord Duke and my Lord of Bath; And that Duke George owned he owed his first setting-out in the World to the Ancestors of my Lord of Bath: It doth plainly appear there was a most particular Friendship and mutual Confidence between them, in Matters of the highest Nature, and chiefest Concern; nay, that this proceeded so far on my Lord of Bath's side in Duke George's time, that he prevailed with King Charles the Second to promise, under the Sign Manual, and recommended it to his Successors, to create my Lord of Bath Duke of Albemarle, if there were a failure of Issue by the Duke.

Then that this Friendship did continue between Duke Christopher and my Lord of Bath, is plain beyond all Controversy, for it began upon a very good Foundation; that is, whereas the Garter should have been given to the Earl of Bath, he prevailed to have it returned

to the young Duke, and it continued so much all along, that there was nothing of moment relating to the Duke's Affairs, in which the Earl was not mainly concerned; and all this is proved by a Series of Letters, continuing down from the Death of Duke George, to the death of Duke Christopher.

In 74, he sends him Word he had pursued his Advice, and his Advice should always be very prevalent with him.

In 75, he tells him, he expected to see him with great Impatience, because he was not able to go on in the Regulation of his Family without his Assistance and Advice; that he had finished his Will, and would make all more perfect when he came to him: It should seem his former Will was trusted in my Lord's Hands; and when that was returned or brought up, in a few Days after this Will of 75 is made; and by that all the Estate, or the main of it, is given to my Lord of Bath. And it was the first Will that he made, I think, after he came of Age, and had any Power to dispose of his Estate in Land; and thereby, as I said, he deviseth the Bulk of it to my Lord of Bath: He always desired, as the Will declares, that in case he had no Issue, the Earl might succeed him in his Honours and Estate, as well out of true Affection to him, as his nearest Kinsman on his Father's side, as out of due Gratitude for the many Acts of Kindness and Service done by the Earl, beyond all the rest of his Kindred and Friends, upon which he humbly desires his Majesty to confer the Dukedom upon him, and that the eldest Son of the Earl, and so successively, the eldest Son of the Family, should be called Lord Monk, to preserve his Name and Honour in Memory of his Father and of himself. There cannot be Words that express more Kindness and Respect, and Intention of Advantage, than are here used.

There was an Attempt by Proofs in this Cause to shake the Credit, even of this very Will; but when the Council on that side came to speak to it, they could produce no Proofs that would at all come near it: It is plain then, that at this time, no Man could have more Kindness for another, than the Duke had for the Earl.

In the Year 1678, there appears the same Sense in the Duke, of the Earl's Friendship by his Letters, and the Obligations of Gratitude he had to him; that he had no Friend in whom he could confide but himself, and desiring him to come to assist him in the Management of his Affairs; that his Kindness and Friendship was never to be forgotten, without the highest Ingratitude.

All this is a sort of Evidence, against which there is no opposition to be made; so it is also continued to the Year 80, when he sent him Word of a Servant's Death, and desired him to secure his Papers and Accounts.

Thus it stood to the time of making that Settlement, and while the Duke and he were upon such Terms with one another, it was no strange thing that he should make such a Deed as this, and the Manner both of preparing and executing it, seems far from having any thing of Surprize in it.

To the 2d Head. Then the next thing that hath been urged, was, that this being a Settlement under a Power of Revocation which he intended to make use of, it was secreted and concealed from him, so that he could not know what his Power was; and several Cases were put, where a Man in such Circumstances, knowingly suffers a Purchaser to go on with his Bargain, he shall not have any Advantage by such a concealed Settlement, those Cases were all admitted to be good, and particularly that mentioned by Mr. Baron Powel, and my Lord Chief Justice Treby, the Case of Mr. Clare: And I think truly I need go no further, than to say that there is no Resemblance between that Case and this; that is, where a Purchaser is concerned, and the Person that conceals the Deed, suffers the Purchaser to proceed without giving him any Notice.

If indeed there had been a full and clear Proof, that the Duke had a real Intention to Revoke this Deed, if he could have known what he was to do in order to it, and had been hindered by the Fraud and Contrivance of any Person concerned in it, in Point of Advantage; and if by such Concealment it was impossible for him to know the true Circumstances of his Power, that would have made a different Consideration in a Court of Equity; but there is no Proof, that these Deeds were ever in the Hands of my Lord of Bath, till some little time before the Duke went beyond Sea, when the Duke delivered them to him.

For as to Aleman's Deposition, that was but a Delivery upon Execution, and not a Delivery for Custody.

And my Lord of Bath in his Answer says, he had not them till then expressly; so that as far as that goeth, it is all the Evidence you have where the Deed lay all the while; and his Answer is fortified in this, by what Mr. Courtney says, that my Lord told him when he came to him, that the Deed it self was in the Hands of the Duke; and he had received the Draught from the Duke to advise upon; And it is further verified by two material Facts, by the Abstract that was taken about some two Years before by Sir Thomas Stringer, and by what is admitted on all Hands, was by my Lord of Bath delivered up when the Will of 87 was preparing; and that the Will of 75, and Deed, being produced together under the Duke's Seal, after his Death, it is to be taken that both together were put under the Cover, and Sealed up by the Duke, and delivered to my Lord of Bath, as he himself says in his Answer: There being then so much Ground to believe that the Deed was in the Duke's own Hands, what Obligation should there be supposed to lie upon my Lord of Bath to make any mention of it to

him; it was always intended to be a private thing, that is plain; there is no Proof what the Purposes of the Duke were in making the Will; the Purport and Effect of the Thing speaks it self.

But my Lord of Bath says, that upon the Selling of Dalby and Broughton to my Lord Jefferies, he did give the Dutchess a Caution not to be so earnest for finishing the Bargain, for she might be a loser by it; which could mean nothing, but that she had an Interest in it by this Deed.

As to the Objection, that my Lord of Bath stood by and saw that Purchase made, and gave no notice of this Deed to the Purchaser: I confess, had my Lord of Bath set up this Deed against, and to overthrow that Purchase, that would have brought it up to the Case of Wraw and Ford; but every body knoweth, that a bare voluntary Settlement is of no force against a Purchaser without Notice; and as to the Leases and Grants of Annuities, there is no Proof that ever my Lord of Bath knew of them.

A voluntary Settlement of no force against a Purchaser without Notice.

Then it was objected, that though it go not so far as a purposed Concealment, yet the thing was out of mind, and the Duke continuing Owner of the Estate, and acting as Owner, though not with all the Circumstances required, those Acts done by him as Owner, are to be supported in a Court of Equity; this seems a hard Demand, for a voluntary Devisee to crave Relief against a prior Settlement with a Power of Revocation; because he that made that Settlement had forgotten it; there is no Precedent to warrant a Decree of that nature, nor is there any Pretence of Reason for it; for betwixt two Persons, each of which claim by a voluntary Settlement, the Matter stands upon an equal foot, and there is no possibility of an equitable Consideration to assist the one against the other.

Where two Persons claim by two voluntary Settlements, the matters stand upon an equal foot.

And if there were any Ground for it, as a Notion, there were no room for any such Notion as to the Proof in this Case; for it is founded upon a Supposition that the Duke of Albemarle had forgotten the Settlement, of which there is no Proof, but only an Argumentative one, drawn from his disposing of his Estate another way and manner, But that he had not forgotten it, besides the Answer of Mr. Greenvill and Sir Walter Clarges, there are other Things to be said:

And as to their Answer, I take it no Decree can be made against a Man's Answer upon the Proof of one Witness; why then should a Decree be expected against a Man's Answer where there is no Proof to the contrary at all?

No Decree can be made against a Man's Answer upon the Proof of one Witness.

Sir Walter Clarges (upon somewhat that had been told him of the Duke's Intentions towards him by his last Will) as should seem, took the Liberty to complain to the Duke, and seemed much discomposed; but the Duke bid him not be concerned at what Stringer said, for he had otherwise better provided for him; now there is no other Provision but what is by this Deed.

Mr.

Mr. Greenvill addreſſed himſelf to the Duke, to thank him for what Kindneſſes (Sir Thomas Stringer acquainted him) he had ſhewn him in his Will; but the Duke replied with ſome Reflection upon Sir Thomas Stringer, (who pretended to have been very inſtrumental in it) that he had never moved him in it, but that he had taken care of him, and his Brother would tell him wherein; and if he would, he might tell his Brother he ſaid ſo: And he ſwears he did go to his Brother, my Lord of Bath, who told him the Duke had indeed provided for him, and ſettled a Part of his Eſtate upon him; but that if the Duke had not allowed him ſo to do by ſending him to him, he would not have told him of it.

All this is a full Proof, that the Duke had not forgotten this Deed at that time; but it cannot be believed, that the Duke had ever forgotten this Deed, without diſbelieving ſeveral Acts that have been ſubſtantially proved to be done by him; as when upon my Lord Lanſdown's Marriage, his Letters do particularly take notice of a general Intereſt he had in him, and ſeems expreſly to refer to this very Deed, as being ſo much concerned in his good or ill Fortune, as my Lord of Bath himſelf very well knew; and congratulating the Match with my Lord Treaſurer's Daughter; he goes on to deſire, that as he had taken care to marry him well, ſo he would have great Regard to his Education; which he did mind him of, remembring ſtill, that he was moſt concerned in him, of any one, except himſelf, as he very well knew. This could refer to nothing but ſome Settlement of his Eſtate, and none appears but this.

There ſeems to have been ſome Attempt to interrupt this Friendſhip and amicable Correſpondence between the Duke and the Earl; for by a Letter dated, as I take it, 31 Jan. 81. the Duke ſays, his Kindneſs and Friendſhip ſhall always be the ſame; and all the malicious Endeavours of ill People ſhall not be able to break the Link between them; ſo that it ſhould ſeem, there were malicious Endeavours uſed to ſow Differences between thoſe noble Perſons; but by whom, is not apparent in the Proof.

But ſtill there is a continued Series of kind Letters between them, which goeth on even to the time of making the laſt Will in 87, as full of Gratitude (all the Duke's Letters, great Numbers of which were produced) as can be, for his continued Services and Kindneſs; nay, down to the time of his going to Jamaica, and while he was there. Now it looks to me very ſtrange, that the Duke ſhould all this while be receiving Obligations, and owning them from my Lord of Bath, and yet muſt be ſuppoſed to have forgotten what he had done in Acknowledgment and Recompence of theſe Services. Then there is beſides all this, the poſitive Teſtimony of Mr. Crofts and his Wife, both ſwearing particular Declarations from the Duke's own Mouth, which can have relation to nothing but this Deed.

There is indeed one thing that is urged as a ſtrong Argument, the Duke intended to alter this Settlement, that is his taking

such formal Steps in preparing and drawing this last Will, his advising with my Lord Chief Justice Pollexfen, and so much Solemnity as was used in having the Parts of it ingrossed and delivered with such Ceremony to three several Hands, It is, they say, hard to imagine he would do all this with a deliberate Intent that it should all signify nothing as to his real Estate, and so quit the World with a great deal of Pageantry and Ceremony to no purpose.

Now it must be owned, that it doth seem a strange Part in the Duke, and the World must be surprized at it; for it is impossible to make the Duke's Actings of a piece, and reconcile such Contradictions: He cannot indeed be cleared from Prevarication; he did certainly intend to deceive the Dutchess, or my Lord of Bath: It is most evident he did keep my Lord of Bath in Hand, that he should have his Estate; for the Testimony of Mr. Prideaux, and other Witnesses, concerning the Duke's Declaration of his intending to settle, and having settled his Estate upon him, we find by this Deed his Estate is so actually settled, and that Mind continued till 81; and it appears by Letters, as well before as since, that Duke Christopher idtrusted him in all his Affairs of Consequence, acted not in any thing but with his Assistance, continually made use of his Friendship at Court, to the time of his Death: When he was dissatisfied with any of his Servants, my Lord of Bath was the Man that must settle the Matter; when he was to purchase, my Lord of Bath must buy for him; when he was to sell, my Lord of Bath was to transact the Matter; when he wanted Money, my Lord was to procure it for him; when he was in danger of losing Money, my Lord is applied unto to prevent it. All this appears by the several Letters that have been read and produced. When he was gone to Jamaica, and any Request at Court, my Lord's Interest was that which he relied upon; my Lord of Bath was the single Trustee to be applied to chiefly in what concerned the Estate, the Keys of the Evidence-Room were to be deposited with him, as being principally concerned if he should miscarry.

Now it must be confessed a Man may do as much as all this comes to, and make use of another Man's Friendship, and not design to give him his Estate, when he had once firmly settled it so, and repeated his Assurance of Kindness, and continued to make Profession of Kindness all along to the time of his Death, and went on to make use of his Service, because he thought he might freely command the Service of one who expected to have such Advantages from him; yet then I do not see but that it must be admitted, that he did deliberately design to impose upon my Lord of Bath; or if he did not, he did intend to impose upon my Lady Dutchess. Now be it which it will, I do think he is not to be excused in reference to the Point of Honour, as to the Request made to the King for the Earl of Bath, and in pursuance of Duke George his Desire, who engaged the late King to promise under his Sign Manual, and he hath made the same kind of Request for Mr. Monk.

Now upon the whole Matter, whether this Will of 1687 was made to free him from some Importunities in his Family, is a great Question. There are some Proofs in the Case that greatly look that way: It is plain he did not execute it for several Months after it was prepared and drawn; and when it was published, it was obtained with great Importunity against his Inclination at that time; and there doth not appear any Intention that it should revoke this Settlement, but on the contrary, it should seem he did not intend so; for there are no Witnesses called to the Will, but the same that came with Stringer from Newcastle-House to that purpose: But whether he did intend it should take effect, as to the Personal Estate only, or to delude my Lord of Bath, which way his Honour is best saved, is not at all to our Purpose to consider, upon the Case before us in Judgment; though I must say, take it one way or the other, he seems to blame, and to have dealt in some sort double.

The 3d Head.

The next Thing insisted upon is, That this Deed is revoked in Equity by this Will; and though the Power be not pursued in all the Circumstances, yet his Intention appearing to make this different Disposition of his Estate, a Court of Equity should supply that Defect.

A Power of Revocation shall not extend further in Equity than the Law will carry it.

Now I take it for granted, that a Power of Revocation shall not be carried further in a Court of Equity than the Law will carry it; the Law hath been liberal in expounding Powers of Revocation favourably; and where the Law expounds a thing according to an equitable Constitution, there is no Reason for Equity to extend it further.

Where there appear to be other equitable Considerations, it may have another Judgment; but if it stands without any Mixture of other Considerations, I think it would be very hard to break through a Settlement, especially so solemnly made, that he thought fit to restrain himself from altering it, without the Assistance of so many Noble Persons, whenever he would make use of the Power thereby reserved to him; I say, it would be a very strange thing for a Court of Equity, without the Mixture of any other Considerations, to assist another voluntary Conveyance against this.

The Case of Arundel and Philpot is a full Authority in this Case, and it has been so often repeated, that I need not mention it any further.

As to what was insisted upon by some about the Revocation, being compleated as to the Number of Witnesses, by the Publication in Jamaica, and the Impossibility of having any Peers there; I must confess, had the Duke in Jamaica had an express deliberate Intention and Purpose to revoke any Acts to testify it, and gone as far in pursuance of the Circumstances as his Condition in those Parts would admit, that might have come in within that Foundation of Equity (to wit) Accident.

But I think there is no Ground of Proof of any such Intention or Action; for the Proof amounts to no more than this: The Duke, to prevent any troublesome Applications to him, shut up himself in his Room, and those that came to him were to come in at the Window; and a strong Box, in which his Papers were, standing under the Window, by frequent treading upon it, he had a Suspicion that there had been some Attempts to force and open it; whereupon he calls for the Box, to open it, and out of it takes several Papers, which he read, or gave to Dr. Sloan to read, several Letters, as I remember, and afterwards he took up a sealed Packquet, and said to the Doctor, This is my Will, and put it down again: Is this any manner of Proof in the World, that this Act was done animo testandi? Much less is it any Proof that there was any notice taken at this time of this Settlement, or that he would avoid it.

The 4th Head.

I would say something to that other Point, that this being a Deed made to confirm and corroborate the Will of 75, is but Ancillary to the Will, and depends upon it, and is to stand or fall with it, and upon the Revocation of that Will did fall with it.

This is an Objection wholly inconsistent with the other Arguments that are used against this Deed, that it was by Surprize; for by those Arguments they would destroy the Deed, as inconsistent with the Will; but now the Argument is turned the other way. But my Lord Chief Justice Holt has so fully and clearly answered that Matter, that I shall not need to trouble you with saying any more in it: The Cases cited about it are in no sort applicable to this Case.

The last thing insisted upon was, supposing the Deed to stand good, yet there being a general Trust raised in it to pay the Legacies in the Will, my Lord of Bath was no more than a Trustee, and the Duke continued Master of the Estate; and he who had such a general Power to charge the Land, might do it to the full Value, and then consequently might dispose of the Land too.

A Trust the proper Subject of a Court of Equity.

Now this Point of Trust is the proper Subject of a Court of Equity; but to expound a Deed which is made on purpose to prevent a Descent upon the Heir, and then to make a general Resulting Trust to let the Heir in, is such a Construction as will apparently contradict it self and the Deed. But that will fall out to be a Point that comes to be considered hereafter, how far this may be a Trust in my Lord of Bath to answer Legacies or Debts in case the personal Estate should fall short; it is not properly considerable now.

Conclusion upon the sole Point.

The only Point that was spoken to by the Councel, and left for the Judgment of the Court, was this, whether in this Case here were sufficient Matter for a Court of Equity to interpose so far as to set aside or impeach this Deed of 81. Now as to that Matter, I think I have the Concurrence of my Lords the Judges in it; and I am of Opinion, that there doth not appear sufficient Ground upon this Case for a Court of Equity to do any such thing; therefore I declare my Judgment:

That

Decree. That as far as my Lord Mountague, and my Lady Dutchess, and Mr. Monk, their Bills pray, that the Court will interpose to set aside this Deed, so far their Bills ought to be dismissed. As to any other Matters that arise in the Case, I suppose there will be Time taken to speak to them: But this is the only Matter in Judgment before us at present.

In

In Cur. Cancel.

Lord Chancellor *SOMERS*,

Lord Chief Juſtice *HOLT*,

AND

Lord Chief Juſtice *TREBY*.

Bertie & Ux. cont. Dom. *Faulkland*.

Term Hil. 9 Will. III.

Lord Chief Juſtice *Holt's* Argument.

THE Caſe was: Mr. Carie being ſeiſed in Fee of the Manors and Lands in Queſtion, upon the 10th of September, 1685, makes his Will, and thereby deviſeth the ſaid Eſtate to Truſtees therein nam'd, and their Heirs, and directs the Truſt thereof to be to the Truſtees and their Heirs in Truſt for Mrs. Willoughby (who was alſo Heir at Law to Mr. Carie) for her Life, in caſe within three Years after his Death ſhe lawfully married the Lord Guilford; and in caſe the ſaid Marriage ſhould take effect to the eldeſt and other Sons of Mrs. Willoughby by the Lord Guilford in Tail-Male; but if no ſuch Iſſue were had, or in caſe the Marriage ſhould not take effect within three Years after the Death of Mr. Carie, then the Truſt was deviſed over to the Lord Faulkland: After, the 20th of the ſame Month, Mr. Carie reciting the Bequeſt to Mrs. Willoughby, makes a Codicil, and thereby declares it to be his Will, That if the ſaid Marriage betwixt the Lord Guilford and Mrs. Willoughby took effect before the Age of Conſent of both or either of them, it ſhould be of no Avail or Signification, unleſs it were confirm'd by both Parties at their Age of Conſent. After, in October following, Mr. Carie died, and divers Tranſactions were betwixt the Guardians of the Lord Guilford and Mrs. Willoughby and her Friends, about the Marriage, who inſiſted upon Terms, and a Settlement of a Proportion of the Lord Guilford's Eſtate upon her: But the Lord Guilford did never make his Applications to her about it, but the three Years after Mr. Carie's

Death did expire: Several Proposals, within the three Years, were indeed made by the Friends of Mrs. Willoughby to the Lord Guilford's Guardians, but not accepted of by the Guardians of the Lord Guilford; and the three Years after Mr. Carie's Death being elapsed, the young Lady married the Plaintiff.

The Question was, Whether this appearing to be the Case, and no Default or Neglect appearing in Mrs. Willoughby, who, as was urged, pressed the Marriage as far as the Modesty of her Sex would allow of, she shall not have the Aid of a Court of Equity?

And this doth arise upon the Construction of the Will; divers Things indeed were mentioned by Councel, and Proof was made of divers Discourses and Letters had passed by Mr. Carie, expressing a Kindness to Mrs. Bertie (then Mrs. Willoughby) his Niece: But all those, and other the Evidences that were produced, were to be rejected; no notice being taken of them in the Bill to which they ought to be confin'd: Besides, such Matters, neither before nor since the Statute of Frauds and Perjuries, would controul the Will; or if they would, yet the Will and Codicil being the last Act of his Life, doth repeal all his other Acts.

He thought, upon Consideration of the Will, there could be no Relief:

1. First, Because the Estate was given to Mrs. Willoughby upon a Condition precedent, which was, That if she should be married to the Lord Guilford within the Time appointed, it is given to her; and such is the nature of a Condition precedent in Point of Law, that no Action interposing can be Ground to relieve upon, if it be not performed: So that being a Condition precedent, although the Lord Guilford had died within the three Years, and so the Condition had become impossible by the Act of God, it could not have helped the Lady. It will not be easie in a Court of Equity to shew any Precedent of a Relief in case of Conditions precedent, as often happens in Cases of Conditions subsequent; which not being favoured, because they go in Defeasance of Estates, this Court may relieve if it be performed in the substantial Part, tho' some of the Circumstances be not pursued.

2. The Second Reason is, Because it is not only so in point of Law, but also by the express Declaration of Mr. Carie the Testator. It was his Purpose that the Marriage should take effect, for he doth not give her the Estate upon any Act in her own Power. It was limited to her in case the Marriage took effect, to which there was to be the Consent of the Lord Guilford, as well as of the Lady; the Marriage was appointed to be within such a Time, or else the Estate to go over to the Lord Faulkland; besides the Addition of the Codicil, although they should marry within Age; yet if both Parties did not confirm the Marriage at their respective Ages of Consent, it was the same thing, and the Lady to be excluded.

3. The Third Reason is, Because it doth appear by the Will, that the actual Marriage of the Lord Guilford to the young Lady Mrs. Willoughby,

loughby, was the only Conſideration of the Gift of the Eſtate; for he had a great Kindneſs for the Lord Guilford, and doth not give it to any Heir that the Lady ſhould have, but only to her Iſſue-Male by the Lord Guilford.

It was urged, that Mrs. Willoughby was Heir at Law, and therefore every thing ſhould be conſtrued beneficial to her; to which it may be confeſſed, that Heirs at Law are much favoured, if the Words in a Will are ambiguous: But that Rule ſhall not extend to defeat an Intereſt well veſted, when the Words of the Will are very expreſs, and the Conſtruction can admit of no doubt.

It was alſo inſiſted by the Plaintiff's Counſel, That if the Lady ſhould by the Will have an Eſtate for her Life, a Decree ſhould alſo be in favour of her Iſſue by the Plaintiff Mr. Bertie; but for that there can be no Pretence, it being ſo very contradictory to the Will, and the Intention of Mr. Carie.

Then it is evident, that as the Teſtator deſign'd a Kindneſs to the Lord Faulkland, ſo he had a Reſpect to his own Name, and more inclin'd to ſupport that than the Lady's Intereſt; for had he had any great Reſpect to the Lady, he would not have put ſuch hard Terms upon her: He hath not given it to her Heirs-Male in general, but ſuch only as ſhe ſhould have by the Lord Guilford; he only gives her a Conditional Eſtate for Life, when otherwiſe after his Death ſhe would have had the abſolute Inheritance; and ſo the Will is ſo far from being to her Advantage, as to amount to a Diſinheritance of her who was the Heir at Law to Mr. Carie the Teſtator.

This being the State of the Caſe, what ſhall a Court of Equity do? Shall it give her the Eſtate, tho' married to another Perſon? This is not within the Words or Equity of the Will, but in expreſs Contradiction to both of them: If the Eſtate indeed be upon a ſubſequent Condition, Equity may interpoſe, where the Subſtance is perform'd, tho' not in every matter literally purſued; but where it is in no Part performed, as in this Caſe, it can never help.

There was a Caſe cited between
the Subſtance whereof was, That R. by Will deviſed an Eſtate to H. P. upon Condition that he ſhould convey Two Thirds of it over to another; which if he did not do, the whole was to go over to a third Perſon: he did not exactly convey over theſe Two Thirds, but did convey what was equal in value to the Two Thirds; and allow'd good, becauſe 1000 l. is as good in one Place, as in another; but had it not been performed, and the Value of the Two Thirds conveyed, it muſt have amounted to a Deſtruction of the Eſtate.

The Caſe of Fry and Porter in this Court, is much ſtronger than this Caſe: For there the Lord Newport deviſed Newport-Houſe to his Lady for Life, and after to his Grandchild Ann Knowles, and to the Heirs of her Body, upon the Condition that ſhe married with the Conſent of his Wife, and the Earls of Warwick and Manchester, or the major Part of them; but if ſhe married without ſuch Conſent, 1 Mod. Rep. 300.

or

or died without Issue, then he gave it to Geo. Porter. After the Devisor died, the young Lady (not having notice of the Will) married without the Consent of any of the Trustees. The Estate was forfeited in Law; and after, in this Court, by the Advice of two Justices, and upon a great Debate, it was held, she could have no Relief; altho' she was an Infant, and had no notice, and consequently did not know that she was under the Obligation of having the Advice and Consent of the Trustees; but yet she lost her Estate, and could not have any Relief. That can't be pretended in this Case; for this Lady was acquainted with it, she had notice, and was willing to comply with the Marriage.

The Case also of my Lord Bath and Mountague was cited, to shew how the Terms on a Power of Revocation ought to be pursued; for those Persons that derive an Estate from another, must take it upon those Terms upon which it is conveyed.

It was objected, That this was a Trust, and this Court may qualify a Trust, and dispose of it in a different manner than of Estates. To which it was answer'd, That this Court hath as great a Power upon an Estate as upon a Trust, and may as well transfer an Estate as it may a Trust: It is the Ground of Equity, in one Case or the other, that entitles this Court to its Jurisdiction.

This Lady was under this further Difficulty, That if three Years were elapsed, and the Marriage between her and the Lord Guilford should take effect, that yet there would be no room for any Relief; but that Case is not this neither; for here she married when there was a Possibility of marrying the Lord Guilford, and so hath destroy'd her Equity quite, by disabling her self; for once disabled, and ever so: So that if it should ever happen to be a Match between this Lady and the Lord Guilford, it could never secure the Estate to her: Infancy will not secure her; for where Infants take by Will, they are bound as strictly as other Persons.

It was also insisted upon, That the Lady was managed by her Trustees; and if the Trustees insisted upon Terms, it would be hard that she, that ought to be govern'd by her Trustees, should lose the Benefit of the Estate by their Means. But how can it be helped? The Trustees did it indeed out of Respect to the Lady, to get the best Terms they could. But they meddled in a Matter they had nothing to do with; they were Trustees of the Estate, but not of the Person, and had no Authority to obstruct the Marriage. Besides, Mr. Carie did not intend there should be any Settlement; he left her a fair Fortune, so as not to stand in need of any Jointure: And when he did not expect such a Provision should be made, how comes it to pass that the Trustees should interpose? It was unreasonable for the Trustees to meddle in it: For the Marriage was design'd during the Minority of the Lord Guilford; and the Trustees of that Lord were not oblig'd to charge their own Estate, and the Lord Guilford himself had no Power to make any Settlement during his Minority.

Then as to the Orders that were obtained heretofore in this Court, they were not at the Prosecution of the Lord Faulkland, who was a perfect Stranger to all these Proceedings, and therefore they can be no Injury to his Title; wherefore he concluded, that the Plaintiff's Bill ought to be dismissed.

And of such Opinion was the Lord Chief Justice Treby, who argued the Day before.

That it was plain upon the devising Words of the Will, that by the Intent of Mr. Carie, the Plaintiff's Lady was to take nothing, but upon a Condition Precedent: The Estate was limited to the Trustees for three Years, and the Profits were to be applied for several Purposes during that time: It was contingent who should take at the end of the three Years; if my Lady married the Lord Guilford, within the three Years, she was to take for Life, and after her Issue-Male by the Lord Guilford; but if she did not marry within three Years after the Devisor's Death, it was to rest in the Lord Faukland. Lord Chancellor *Somers*.

It was said by the Defendant's Councel, That the Words did not imply a Condition precedent: But if they were to advise how to make a Condition precedent, they could not frame one stronger than the Words set down.

To say, That if the Lady were lawfully married, is the same thing as if she were willing to be married, is a strange Construction, and a manifest Violence to the plainest Words.

It is not possible that any other part of the Will can make a different Construction from the devising Words.

Nothing can be inferred from her being Heir at Law; for the frame of the Will is such, as to exclude her from claiming as Heir at Law; for tho' she complied with the Terms of the Will, she was to have no more than an Estate for Life.

As to the Intention of Mr. Carie, in Expressions precedent, that can make nothing in the Case; for he might change his Mind as often as he pleased.

Some Letters of Mr. Carie to the Lady were objected, which, had they been read or prov'd, would have been of little use, because it is not pretended that he was at all after surprized in the making or penning of the Will.

The precedent Intention was as fully proved in Fry and Porter's Case, as in this; and yet there it proved ineffectual.

It was said, That it was not the Testator's Design to exclude the young Lady, without her Default. It is most evident that it was his Intent to disinherit her; for he gave her only an Estate for Life, by Will, in case she did comply with the Terms of it; but nothing, if she did not.

Upon Consideration of the Words of the Will, he had as great a Consideration to the Lord Guilford as for this Lady; the Remainder was limited to the Issue of the Lady by the Lord Guilford.

Then whether it ought to make a Difference, that the Interest disposed of by Mr. Carie was not a legal Interest? Nothing is surely

better settled in this Court. Then Rules of Property, if the same Words are used, cannot have different Significations in several Courts, altho' Courts of Equity may and do relieve against Points of Law, in case equitable Considerations do arise thereupon.

It was insisted, That altho' it were admitted that the Condition imposed was not literally perform'd, yet if it were comply'd with in Equity, it would suffice; and that it was so, they urged, That if the Lady did all in her part to be perform'd, she should not lose the Estate; that this was the favourable Case of Infancy, and the Case of Forfeiture; that the Lady made such Advancements as the Modesty of her Sex would admit of; that she sent Proposals, such as were condescending on her part, to consummate the Marriage, and stay'd till the Lord Guilford came to his Age of Consent before she married.

As to the latter part of the Case, he said, he did not doubt but that if the Defendant, the Lord Faukland, who was to have the Advantage of her not marrying, had by any under-hand Acts of his put a Stop to the intended Marriage, there Equity would have interpos'd for the Benefit of the Lady: But whether any other Cause whatsoever, that did not arise from the Act of those that were to take Advantage by it, would be sufficient to excuse a Non-performance, would be hard to maintain. If the Lord Guilford had died within the Time, or refused to marry her, she had not been in a better Case: So if he had married her, and had after dissented at the Age of Consent, tho' in such Cases it would be hard, it was Mr. Carie's Disposition, and cannot be helped. This Court cannot make a new Will; but a Man that hath an Estate hath the full Power over it; and Mr. Carie might annex what Conditions he pleased to his own Estate.

Besides, the Lady and her Trustees are not wholly to be excused; for upon the 16th of December, 85, the Trustees of the Lord Guilford desir'd a present Marriage; to which she answer'd in writing: To her the Proposals were made, and the Answer, That she, when he attained the Age of Consent, would give her Answer, was a Refusal for that time.

Then further Steps were taken: The Lady sent her Proposals in to the Lord Guilford; to which his Guardians answered, That he was ready to consummate the Match, but could not enter into the Consideration of the Proposals made.

The next Step was made by the Guardians of the Lord Guilford, signifying, That he had arrived to the Age of Fourteen, and was ready to perform the Marriage: The Answer to which, in writing, was, That she would first expect her Proposals to be complied with.

The Father of the Lord Guilford died before Mr. Carie the Testator; so that Mr. Carie might have informed himself of the Lord Guilford's Estate, how it was left, and whether any Settlment might be conveniently made by him upon the Match: But the Testator did not impose any Terms, or require any thing to be done by that Lord, but that he should marry the young Lady. Mr. Carie knew the Age of both the Parties, and restrained the Marriage to the three years after

after his Death; at which time no Settlement could be made, because of the Infancy of the Lord Guilford.

Infancy can be no Excuse for the Non-Performance of the Condition, because it is plain the Condition was to be performed when an Infant, or else it could never have been performed. In Fry and Porter's Case, the Lady was an Infant, and is a harder Case than this, because there was no notice of the Will at all: But where an Infant is bound to perform a Condition, he is bound to it as strictly as other Persons of full Age.

As to the Proposals, in behalf of the Lady, made,

They were to put the young Lord in a worse Case than was designed by the Will of Mr. Carie.

Besides that, the Lord Guilford was not to take any Estate himself by that Will, only the Issue-Male he should have by Mrs. Willoughby.

Then if the Lord Guilford might have gone further than he did, if he had pleased; yet that is not to be the Measure of Justice in case he went as far as he was obliged to do.

If the Proposals on the part of the young Lady were never so reasonable, and the Lord's Guardians were very unreasonable, that doth not relate to the the Person in Remainder, without any Default of the Lord Faukland, the Trust is vested in him, and what Equity is there to take it from him, who is no Confederate nor Party to any Contrivance to defeat the Lady? There was no Suit at all against him; he was an Infant, and not privy to any ill Practice: The Condition was not performed, and thereupon his Interest commenced.

The Case of the Lord Salisbury and Bennet went upon different Grounds from this Case, because there was no Disposition of the Money over; and then the Rule admits it shall be only taken in Terrorem. The Sum of Money in the Case mentioned, was to be divided amongst the Daughters, if they married with Consent of their two Aunts, under their Hands and Seals: The one of the Aunts agreed to the Marriage of one of the Daughters, under Hand and Seal; the other Aunt was attended about it, but hesitated upon the Matter, and told the intended Husband, that she was going out of Town, and advised him to pursue the Design; by which she did not absolutely refuse him, but until she came to Town.

Where such things as are to be performed, may be valued, as conveying an Estate, or paying Money, there this Court doth give Relief; because it can make amends for want of Time and other Circumstances: So in case of Conditions subsequent, equitable Considerations may govern; but otherwise, in case of Conditions precedent, where nothing ever vested. If Conditions subsequent, annexed to Estates, become impossible by the Act of God, the Party shall have the Estate; but otherwise, in case of Conditions antecedent.

Whereas it was pretended, that the Marriage of the Lady to Mr. Bertie should be an Equivalent to her Marriage with the Lord Guilford; that cannot be warranted: For tho' both the Persons were

were of equal Honour and Estate, yet the Intent of Mr. Carie is to be considered, who had an Eye to the Lord Guilford: And therefore this is not to be resembled to the Conveyance of an Estate, or Payment of Money, where such Equivalents may be allowed; and Mr. Bertie's Councel were in this Bill at a loss what Conveyance of the Estate to ask.

Then the last thing to be considered in the Case, was, how far the Proceedings in Chancery might influence it. It was urged, that several Orders had been made in this Court in Opposition to the Proposals of the Guardians of the Lord Guilford by the Lord Chancellor Jefferies; That no Marriage should be had, unless a Compliance was first made to the Lady's Offers; that the Will directs the Account to be taken in Chancery; and that this Court hath the care and ordering of Infants. To which he answered, That true it was, that several things were trusted with this Court; It hath Jurisdiction of Infants, Idiots, and Charitable Uses. Several Statutes have altered matters in the Power of this Court, and so far they are alter'd, and no farther. The Courts of Wards and Livery, with respect to Infants and Idiots, were taken out of this Court, and transferr'd in some measure to that; but by the Dissolution of that Court, returns to this again: That Guardians are appointed by Writ for Infants, and one or more Guardians jointly: That the Law is favourable to Infants; no Decree of this Court shall be had against them, but what they may shew Cause against when they come of Age. This Court will make Strangers accountable to Infants, in case they take the Profits of their Estate; and tho' a Particular Person be appointed to take an Account, this Court can direct it shall be taken before the Court. This Court, upon Application made to it by Guardians, hath settled the Maintenance of Infants; but in case of Infants, this Court would never dispence with a Condition precedent, or take away the Right of one Infant (as the Lord Faulkland was) and give it to another, or can it ever bind those Persons that were never Parties to the Suit.

The Orders obtained of the Lord Chancellor Jefferies, were upon Misinformation, and false Suggestions: They told him, That good Terms might be had for the Lady, in case they were insisted upon: It was suggested, that she was ill provided for, and the End of the Petition did not agree with the Suggestions of it; That therefore the Lord Chancellor not being informed of the true Circumstances of the Fact, the Orders grounded upon such false Suggestions could not be at all binding.

Wherefore he decreed that the Plaintiff's Bill should stand dismissed

FINIS.